Supreme Court, U.S.
FILED
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No. 97 1453

In The

Supreme Court of the United States

October Term, 1997

CHARLES H. KUIPER, SR., MAE E. KUIPER and CHARLES A. KUIPER, JR., d/b/a CHARLES H. KUIPER & SON FARMS,

Petitioners,

vs.

AMERICAN CYANAMID COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Federal Insecticide, Fungicide, Rodenticide Act (FIFRA), 7 U.S.C.S. § 136v(b), preempt state common law or statutory remedies for crop damages caused by a FIFRA registered pesticide?

2. Does the Federal Full Faith and Credit Act, 28 U.S.C.S. § 1738, preclude the federal courts from re-adjudicating issues (including the federal preemption issue) which have been decided against American Cyanamid Company by the Wisconsin Supreme Court in a virtually identical suit?

3. Are remedies arising from misrepresentation and available under WIS. STAT. § 100.18 barred by its statute of limitations?

4. Is it error to grant a defendant dismissal of a suit against it while that defendant is violating its duties regarding discovery?

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The Kuipers respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as *Kuiper v. American Cyanamid Co.*, 131 F.3d 656 (7th Cir. 1977), and is reproduced below in the Appendix to this Petition as Appendix ("App.") A at 1a. The Decision and Order of the United States District Court for the Eastern District of Wisconsin, Rudolph T. Randa, J., is reported as *Kuiper v. American Cyanamid Co.*, 913 F. Supp. 1236 (E.D. Wis. 1996) and is reproduced below as App. B at 20a. The district court's Decision and Order on plaintiffs' motion for relief from judgment, Rudolph T. Randa, J., is reported as *Kuiper v. American Cyanamid Co.*, 960 F. Supp. 1378 (E.D. Wis. 1997) and is reproduced below as App. C at 42a. The Order on plaintiffs' motion to compel and for sanctions, dated February 14, 1996, Aaron E. Goodstein, Magistrate, is reproduced below at App. E at 85a. The decision of the Wisconsin Supreme Court with which the opinions below are claimed to conflict is reported as *Gorton, et al. v. American Cyanamid Co.*, 194 Wis. 2d 203, 533 N.W. 2d 746 (Wis. 1995), *cert. denied*, __ U.S. __, 133 L. Ed. 2d 701 (1996), and is reproduced below as App. D at 59a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit ("Court of Appeals") was entered on December 5, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C.S. § 1254(1) (1988).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

ARTICLE IV provides in pertinent part:

> SECTION 1. Full Faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.
>
> SECTION 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states . . .

AMENDMENTS TO THE UNITED STATES CONSTITUTION

ARTICLE XIV, Section 1 provides in pertinent part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WISCONSIN CONSTITUTION

ARTICLE I

> **Equality; inherent rights.** SECTION 1. All people are born equally free and independent, and have

certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

Remedy for wrongs. SECTION 9. Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.

STATUTES

Because the statutory provisions involved in this matter are lengthy, the immediately pertinent portions of statutes have been set out in App. G at 90a. These provisions include:

28 U.S.C.S. § 1738 (Law. Co-op. 1989).

7 U.S.C.S. § 136**(bb)** (Law. Co-op 1994).

7 U.S.C.S. § 136a **(a)**, **(c)** (1) (C), **(c)** (5) (A)-(D), (f) (Law. Co-op. 1994).

7 U.S.C.S. § 136v**(a)**, **(b)** (Law. Co-op. 1994).

WIS. STAT. § 100.18 (1989).

STATEMENT OF THE CASE

Petitioners are Wisconsin farmers. Respondent, American Cyanamid Company ("AmCy") manufactures and sells a registered herbicide known as SCEPTER. The Kuipers applied

SCEPTER to their soybean fields in 1987 and 1988 to control broadleaf weeds and grasses. The soybean fields were rotated to corn in 1988 and 1989. SCEPTER injured the corn and lessened its yields.

Petitioners sued in the Circuit Court for Racine County, Wisconsin seeking damages for crop losses caused by SCEPTER. Petitioners' Complaint asserted theories of liability which included a claim based on misrepresentation, a request for the relief provided by WIS. STAT. § 100.18 (1989) for false or misleading advertising, and a request for punitive damages based upon AmCy's outrageous conduct with respect to SCEPTER.

AmCy contends that the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C.S. § 136v(b), has preempted Kuipers' state law damage claims. The Kuipers contend that their damage claims are not preempted and that the preemption issue, among others, is governed by the Wisconsin Supreme Court's decision in *Gorton, et al. v. American Cyanamid Co.*, 194 Wis. 2d 203, 533 N.W. 2d 746 (Wis. 1995) *cert. denied*, __ U.S. __, 133 L. Ed. 2d 701 (1996) (hereinafter "*Gorton*").[1] (App. D at 59a).

As noted by the district court, "*Gorton* involved facts virtually identical to those alleged [by the Kuipers]." *Kuiper,*

1. After AmCy removed this case to federal court, the Petitioners moved the district court for an order precluding AmCy from relitigating the issues which had already been decided against AmCy in *Gorton*. AmCy, in turn, moved for summary judgment on the issue of federal preemption. Because the parties agreed that *Gorton* would impact a decision in this case, the parties stipulated to a deferral of scheduling in *Kuiper* pending a final determination of issues, including preemption, from the Wisconsin Supreme Court. The Wisconsin court held preemption inapplicable. The district court granted summary judgment against the Kuipers on February 15, 1996.

913 F. Supp. at 1240. (App. B at 27a). In opposition to AmCy's motion for summary judgment, the Kuipers submitted into this record nearly all of the evidence bearing on liability which had been admitted in *Gorton*. When the jury considered this evidence in *Gorton*, it found that AmCy had been negligent regarding SCEPTER and that AmCy's conduct had been outrageous.

The liability evidence common to both cases included: (1) advertising and promotional literature regarding SCEPTER stating that SCEPTER is "Extremely Safe" to follow corn; (2) AmCy's internal documentation of its tests of SCEPTER before it was generally marketed which showed carryover damage to corn in various states, including Wisconsin; (3) a memo of a July 23, 1985 meeting of AmCy personnel which documented that SCEPTER's recommended application rate "will cause carryover injury at some locations in Wisconsin"; (4) an AmCy advertising publication in which its Dr. Frank Congleton is misquoted regarding SCEPTER's effect on follow corn; (5) an AmCy internal report indicating that application rates below the recommended rate had reduced corn yields between 10 and 20 percent, depending upon the method of incorporation used; and (6) other advertising materials which made assurances that it would be "**Extremely Safe**" to plant corn following SCEPTER (emphasis in original); which stated that "numerous follow-crop field tests for several years show that growers can safely plant back to major crops without concern when they use the labeled treatments"; which emphasized that "**SCEPTER Is Safe On Corn Following Soybeans**." (emphasis in original); and which stated that "[r]esearch findings were conclusive [that] there is no problem rotating corn after soybeans treated with SCEPTER."

The record made in this case shows that both *Gorton* and *Kuiper* involve the same advertising regarding SCEPTER, the

same crops, the same crop year, the same geographic area, and that both farmers' corn was damaged by SCEPTER.

This case was held in abeyance pending the Wisconsin Supreme Court's decision in *Gorton*. The Kuipers have contended in courts below that the holding in *Gorton* precludes re-decision on issues decided against AmCy in *Gorton*, including the issue of whether FIFRA barred these state law damage claims.

In *Gorton*, the Wisconsin Supreme Court stated:

> We conclude that not only does the Gorton Farms' misrepresentation claim survive preemption under FIFRA, the evidence adduced at trial was credible and sufficient to sustain the jury's finding that American Cyanamid made negligent misrepresentations of facts as to the safety of SCEPTER and that this conduct was outrageous.

Gorton, 194 Wis. 2d at 225-26, 533 N.W. 2d at 756. (App. D at 77a).

The Wisconsin Supreme Court followed this Court's decision, holding:

> We follow the *Cipollone* reasoning on this point and hold that Gorton Farms' claim based on misrepresentation survives preemption under FIFRA. We see nothing in FIFRA that seeks to overturn the longstanding rules governing misrepresentation. On the contrary, FIFRA simply seeks uniformity in labeling and packaging and mandates that states shall not impose labeling or packaging requirements other than those prescribed

> by the statute itself. Further, our reading of sec. 136v(b) leads us to conclude that its preemptive effect does not encompass the general duty not to make false statements. Quite simply, claims based on misrepresentations of fact do not challenge the labeling of a manufacturer's product.

Gorton, 194 Wis. 2d at 224-25, 533 N.W. 2d at 755. (App. D at 76a).

In *Gorton*, AmCy petitioned this Court for a writ of certiorari to the Wisconsin Supreme Court. Curiously, AmCy's petition did not challenge the Wisconsin Supreme Court's decision regarding preemption. AmCy's petition related only to an award of attorney fees under WIS. STAT. § 100.18. (App. F at 89a). The petition was denied.

In February, 1996, just one month after AmCy's petition for certiorari was denied and the *Gorton* decision was subject to no further appeal, the district court dismissed the Kuipers' suit. The district court held that SCEPTER damage claims are preempted by FIFRA. In so doing, the district court contradicted the decision of the Wisconsin Supreme Court.

The Kuipers appealed the dismissal and also moved for relief in the district court. In February, 1997, the Kuipers' motions were denied, which denials were also appealed. The United States Court of Appeals for the Seventh Circuit consolidated the appeals.

The Seventh Circuit affirmed the district court's dismissal. It did not follow *Gorton*. The court below states "*Gorton* conflicts with other FIFRA preemption cases." *Kuiper*, 131 F.3d at 661. (App. A at 9a).

BASIS FOR FEDERAL JURISDICTION IN THE COURT IN THE FIRST INSTANCE

The district court had jurisdiction as a civil action arising under the laws of the United States pursuant to 28 U.S.C.S. § 1332 based upon the following facts:

1. Compensatory damages in this action exceed $50,000;

2. All plaintiffs in this action were, at the time that the action was commenced, and still are, residents of the State of Wisconsin;

3. American Cyanamid Company, the sole defendant to this action was, at the time the action was commenced, and still is, a corporation incorporated under the laws of the State of Maine, and was not, and is not, a citizen of the State of Wisconsin, wherein this action was commenced. The principal place of business of the defendant, American Cyanamid Company, was, at the time the action was commenced, and still is, located in the State of New Jersey and not in the State of Wisconsin.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE OF THE CONFLICT BETWEEN THE DECISION BELOW AND A WISCONSIN SUPREME COURT DECISION.

In dismissing the Kuipers' damage claims arising from SCEPTER, the court of appeals decided an important federal question in a way that admittedly conflicts with the decision of

Wisconsin's court of last resort in *Gorton*. (App. A at 19a and App. D at 76a). In *Gorton*, the Wisconsin Supreme Court held that "[a]ll of the statements assuring that SCEPTER was 'safe' and 'extremely safe' had no relation to the labeling or packaging of the herbicide." *Gorton*, 194 Wis. 2d at 226, 533 N.W. 2d at 755. (App. D. at 77a). In contrast, the Seventh Circuit concluded "that the alleged misrepresentations relied on by the Kuipers essentially repeat the follow crop restrictions on SCEPTER's label." *Kuiper*, 131 F.3d 663; (App. A at 12a). A more clear dichotomy could not exist.

Gorton involved facts which are virtually identical to those alleged here. *Kuiper*, 913 F. Supp. at 1240. (App. B at 27a). In addition, AmCy's defense in both *Gorton* and *Kuiper* is identical — FIFRA, 7 U.S.C.S. § 136v(b), bars crop loss damage claims based upon misrepresentations regarding a registered pesticide.

The district court acknowledged that its decision conflicted with the decision of the Wisconsin Supreme Court. "Thus, while the Court gives serious consideration to the views of the Wisconsin Supreme Court on such issues, it is not bound by that court's decision in *Gorton*." *Kuiper*, 913 F. Supp. at 1243. (App. B at 36a). In affirming the dismissal, the court below chose to follow a FIFRA case previously decided by that circuit. *Kuiper*, 131 F.3d at 662. (App. A at 10a).

Because this case presents an important federal question which has been decided in a way that conflicts with a decision by a state court of last resort, this petition should be granted in accord with the Rule 10(a) of this Court.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH PRINCIPLES FOR DETERMINING PREEMPTION AS ESTABLISHED BY THIS COURT.

Interpretation of preemptive language must be informed by two presumptions:

> First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. . . . That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety. Second, our analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment. . . . that "[t]he purpose of Congress is the ultimate touchstone" in every pre-emption case.

Medtronic, Inc. v. Lohr, 518 U.S. __, 135 L. Ed. 2d 700, 715 (1996). "[T]he historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991). In addition, preemptive language must be read fairly but narrowly. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992).

The issue raised here has never been decided by this Court. Specifically, that issue is: Is the phrase "any requirements for labeling or packaging," contained in 7 U.S.C.S. § 136v(b) (App. G at 93a), intended to abolish state common law damage actions?

The meaning of "any requirements" in federal statutes has been addressed in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 and *Medtronic*, 135 L. Ed. 2d 700. In *Cipollone*, this Court held that "requirements" did include common law claims. In *Medtronic*, upon analysis of this language in the context of that statute, the Court observed that "requirements" would pre-empt few, if any common law duties. These cases teach that language must be assessed in the context of each statute as a whole to ascertain whether prohibitions against state requirements for labeling or packaging are intended to abolish state common law damage claims.

While this Court has not addressed "requirements" under FIFRA, it has stated that the "general goal of the 1972 amendments [of FIFRA was] to strengthen existing labeling requirements and ensure that these requirements were followed in practice." *Mortier*, 501 U.S. at 613.

> [FIFRA] certainly does not equate registration and labeling requirements with a general approval to apply pesticides throughout the Nation without regard to regional and local factors like climate, population, geography and water supply.

Mortier, 501 U.S. at 613-614.

FIFRA's preemption is limited to the express language of 136v(b). *Mortier* established that FIFRA does not preempt the field and that "[w]hatever else FIFRA may supplant, it does not occupy the field of pesticide regulation in general." *Mortier*, 501 U.S. at 612-13. FIFRA leaves "ample room for states and localities to supplement federal efforts" because it "leaves substantial portions of the field vacant." *Mortier*, 501 U.S. at 613. The court below, however, ignored *Mortier*.

This Court has also directed that preemptive language must be fairly but narrowly interpreted in light of the states' historic control over their own police powers. *Cipollone*, 505 U.S. at 518. The court below did not follow this directive. By following its own precedent, the court continued to use a most broad interpretation of preemption. It also ignored cogent reasoning of this Court to the effect that "[i]t is, to say the least, 'difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct. . . .' " *Medtronic*, 135 L.Ed.2d at 717.

The court below did not determine preemption issues with the guidance and light provided by this Court in *Medtronic* and *Mortier*.

This Court has stated that preemption cannot be inferred from silence. *See Mortier*, 501 U.S. at 607. In the absence of a clear and direct statement, it is inconceivable that Congress intended to leave victims with no remedy at all. *Mortier* has established that states retained the right to regulate pesticides. *Mortier*, 501 U.S. at 614. The inevitable conclusion, therefore, is that, like *Medtronic*, seldom, if ever, will any state law remedy be preempted. This Court should grant the petition to establish whether FIFRA's express preemption language contained in 7 U.S.C.S. § 136v (App. G at 93a) interferes with state common law claims. Granting the petition is also warranted under the Court's Rule 10(c).

III.

THE PETITION SHOULD BE GRANTED BECAUSE OF THE MANY DECISIONS WHICH CONFLICT REGARDING FEDERAL PREEMPTION UNDER FIFRA.

Since 1972, a multitude of cases have reached irreconcilable decisions regarding the extent, if any, to which FIFRA preempts state law remedies for damages caused by registered pesticides.

The Circuit Court for the District of Columbia considered preemption under FIFRA and held that:

> if a state chooses to restrict pesticide use by requiring that the manufacturer compensate for all injuries or for some of these injuries resulting from the use of a pesticide, federal law stands as no barrier.

Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir. 1984).

Several other circuits have held that common law claims are preempt to the extent that they challenge the adequacy of labeling or packaging. *King v. E.I. Dupont De Nemours & Co.*, 996 F.2d 1346, 1349 (1st Cir. 1993), *cert. dismissed*, 510 U.S. 985 (1993); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993) (*Worm II*); *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1024-25 (5th Cir. 1994); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993); *Bice v. Leslie's Poolmart, Inc.*, 39 F.3d 887, 888 (8th Cir. 1994); *Taylor Ag Indus. v. Pure-Gro*, 54 F.3d 555, 560 (9th Cir. 1995); *Arkansas-Platte & Gulf v. Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1179 (10th Cir. 1993) (*Arkansas-Platte II*), *cert. denied*, __ U.S. __, 114 S. Ct. 60 (1993); and *Papas v. Upjohn Co.*, 985 F.2d 516, 519 (11th Cir. 1993) (*Papas II*), *cert. denied*, __ U.S. __, 114 S. Ct. 300 (1993).

While these courts, unlike *Ferebee*, agree that some common law claims are preempt, they disagree on the extent to which such preemption occurs. The First Circuit has recently stated that the circuits are not unanimous even as to FIFRA itself, let alone other statutes. *Grenier v. Vermont Log Bldgs.*, 96 F.3d 559 (1st Cir. 1996).

Furthermore, *Medtronic* highlights the erroneous approach which has been taken in cases such as *Papas II* and *Arkansas-Platte II*.[2] All Justices in *Medtronic* are in agreement that:

> [w]here a state cause of action seeks to enforce [a federal] requirement, that claim does not impose a requirement that is "different from, or in addition to" requirements under federal law. To be sure, the threat of a damages remedy will give manufacturers an additional cause to comply, but the requirements imposed on them under state and federal law do not differ. Section § 370k does not preclude States from imposing different or additional *remedies*, but only different or additional *requirements*.

Medtronic, 135 L. Ed. 2d at 733 (O'Connor, J. concurring in part and dissenting in part) (emphasis in original). The *Pappas II* and *Arkansas-Platte II* decisions stand in stark contrast to *Medtronic*. These two cases are among those with which the Court below agreed.

The court below also referred to a conflict between circuits on advertising as a potential source of liability. According to the court below:

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2. *Pappas II* and *Arkansas-Platte II* conflict with *Worm II* on the issue of a state's authority to police manufacturers' compliance with FIFRA. *Lowe v. Sporicidin Int'l*, 47 F.3d 124, 128 (4th Cir. 1995).

> Under both approaches, FIFRA preempts state law claims when the challenged advertising merely reiterates the label. The difference is that the Fourth Circuit holds that FIFRA allows state law claims against advertisements that 'substantially differ' from the label, while the Ninth and Eleventh Circuits hold that FIFRA preempts these claims as well.

Kuiper, 131 F.3d at 663. (App. A at 12a).

Other courts have read these decisions differently. For example, the Court of Appeals of Tennessee recently cited to the Fourth and Ninth Circuits in support of the proposition that opinions suggest claims based upon information or assurances going beyond the label are not preempt.[3] *Hughes v. Tennessee Seeds of Brownsville, Inc.*, 1997 WL 710935, Prod. Liab. Rep. (CCH) ¶ 15,121 (Tenn. App. 1997). The Supreme Court of Louisiana implicitly reached the same conclusion in *Hopkins v. American Cyanamid Co.*, 666 So. 2d 615 (La. 1996). As a consequence, the scope of FIFRA preemption is in a state of confusion on a national level.[4]

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3. This interpretation of the cases is consistent with *Cippolone*'s holding that fraudulent misrepresentation claims, including those based on allegedly false statements made in advertisements, are not preempted because they are predicated upon the general duty not to deceive. *Medtronic*, 135 L. Ed. 2d at 725, n.19.

4. Furthermore, there is an apparent conflict even within the Ninth Circuit, itself. According to *Taylor*, common law claims based upon inadequate warnings in point-of-sale literature are preempt. *Taylor*, 54 F.3d at 561. Nevertheless, state regulations requiring additional warnings in point-of-sale literature are not preempt. *Chemical Specialties Mfrs. Ass'n v. Allenby*, 958 F.2d 941 (9th Cir. 1992). Notably, the Second Circuit, has also held that statutes

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There is also conflict between the federal and state courts' treatment of what constitutes "substantially different" under preemption analysis. The Seventh and Eighth Circuits have opined that representations of "safety" are nothing more than a repetition of labeling information and are, therefore, preempt. *Welchert v. American Cyanamid Co.*, 59 F.3d 69 (8th Cir. 1995); *Kuiper*, 131 F.3d at 665 n.6. (App. A at 1a). The Wisconsin Supreme Court is joined by the Louisiana Supreme Court and the Illinois Court of Appeals in its determination that claims based representations of safety are not preempt because they do not relate to labeling or packaging. *Hopkins*, 666 So. 2d 615; *Malone v. American Cyanamid Co.*, 649 N.E. 2d 493 (Ill. App. 4 Dist. 1995). According to these courts, Congress did not intend, by enacting § 136v(b), to insulate a company like AmCy, who manufactures and distributes herbicides, from any liability for an implied breach of warranty based upon claims of safety made in that company's advertising. *Malone*, 649 N.E. 2d at 499.

IV.

THE PETITION SHOULD BE GRANTED BECAUSE THIS CASE PRESENTS IMPORTANT ISSUES.

A. This case is important because equal justice under the law is being denied.

The United States Constitution demonstrates the importance of the equal protection of the law by expressly providing for it in its Fourteenth Amendment. Wisconsin's Constitution

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(Cont'd)
requiring the provision of warning and safety information through a variety of means, including signs and information sheets, are not preempted by FIFRA. *New York State Pesticide Coalition v. Jorling*, 874 F.2d 115 (2nd Cir. 1989).

addresses "equality" in the first section of its first Article. The utmost importance of equal protection under the law is self-evident.

Equal protection under the law is violated when there is no "rational basis which justifies a difference in rights afforded." *St. ex rel. Watts v. Combined Community Servs.*, 122 Wis. 2d 65, 77, 362 N.W. 2d 104 (Wis. 1984).

In Racine County, Wisconsin, Gorton Farms has been afforded legal remedy for its SCEPTER caused damages, but Kuiper Farms is being denied a like remedy. Wisconsin's court has given Gorton Farms a legal remedy for the damages caused by AmCy's wrongful conduct. The federal courts have denied the Kuipers a legal remedy for the damages AmCy caused by the same wrongful conduct. There is no rational basis which justifies the different treatment. Certiorari by this Court is needed to address and correct the errors that led the courts into unequal treatment of claims.

B. The case is important because the public's confidence in the state and federal judicial systems is being jeopardized.

In *Gorton*, AmCy litigated through the Wisconsin courts the issue of whether FIFRA barred state common law claims for the damages done by its registered pesticide, SCEPTER. In *Gorton*, the defense of federal preemption was argued by AmCy both in the trial court and in the Wisconsin Supreme Court. In that litigation, AmCy petitioned this Court for a writ of certiorari. However, in its petition, AmCy did not raise any issue relating to the Wisconsin Supreme Court's rulings on federal preemption. (App. F at 89a). The fact that AmCy did not present any issue relating to federal preemption in its Petition for Certiorari would suggest that AmCy had accepted the validity of the decision by the Wisconsin Supreme Court regarding federal preemption.

When the Kuipers sued AmCy in state court (which happened after the *Gorton* verdict), AmCy removed the Kuipers' suit to federal court. There, like in the state courts in *Gorton*, AmCy again argued that crop damage claims are barred by federal preemption. Did AmCy avoid raising the merits of preemption with this Court because it felt that by "forum shopping" in future cases against it AmCy might obtain more favorable holdings? AmCy's avoidance of the preemption issue with this Court and its resort to the defense of federal preemption in lower federal courts is not consistent and calls into question whether AmCy is being totally candid with the courts regarding the preemption issue.

Public confidence in the judicial system is rooted in the assumption that all persons will be treated equally. In Racine County, Wisconsin, neighboring farmers have not been treated equally.

This unequal treatment tends to undermine the assumption of the public that all persons do receive equal treatment in the courts. AmCy's avoidance of the preemption issue before this Court and AmCy's later successful use of the same issue in a "shopped forum" smacks of "legal maneuvering", the likes of which jeopardizes the public confidence in the judicial system. A grant of certiorari will protect the public's confidence in the judicial system and will eliminate any risk that "legal maneuvers" have won out over justice.

C. This case is important because in it federal courts probably have violated their duty to give full faith and credit to a state court judgment.

The importance of full faith and credit is demonstrated by the fact that it is expressly stated in United States Constitution, Art. IV, Sec. 1, and also expressly legislated in federal statutes,

28 U.S.C. § 1738. In addition, this Court has acknowledged that resolution of issues relating to full faith and credit have the importance warranting grant of certiorari. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 878 (1996).

The court of appeals' decision avoids this important federal issue by its questionable conclusion that issue preclusion is not required in this case under Wisconsin law. The court below held that differences in evidence would defeat issue preclusion under Wisconsin law, despite virtually identical liability evidence in both cases. The court below also stated that Wisconsin would not invoke issue preclusion because of "fairness". *Gorton* established that regarding SCEPTER AmCy is guilty of outrageous misrepresentation. Outrageous misrepresentation is not fair. *A fortiori* outrageous misrepresentation does not provide the "fairness" needed to avoid issue preclusion in Wisconsin.

If the court below erred in holding that issues are not precluded, this case presents the important issue of full faith and credit. If the court below did not so err, then this case presents important issues of federal preemption under FIFRA.

D. The case is important because a most basic right, the right to know, has been impaired.

Summary judgment was granted in favor of AmCy while it was violating its duties to provide information in accord with the federal rules relating to discovery. Within a day of the Federal Magistrate finding that AmCy was in violation of its obligations to provide discovery (App. E at 85a-87a), the district court dismissed the Kuipers' claims. (App. B. at 41a). The courts below by implication have held that federal preemption can also impair a claimant's right to obtain discovery regarding a registered chemical.

Gorton has established that AmCy was guilty of outrageous misrepresentation regarding SCEPTER. *Gorton*, 194 Wis. 2d at 225-26, 533 N.W. 2d at 756. The courts below have held that such misrepresentation has been preempted by FIFRA. In effect, the courts below have immunized the providers of registered pesticides from misrepresentation liability. Consumer choices depend on a "right to know" all information which bears on their choice of a product. To immunize from liability the misrepresentations made by the purveyors of registered pesticides is to disenfranchise consumers of their right to know whether their purchases include risks which are unacceptable to them.

FIFRA does not take rights and responsibilities from individual consumers. The standard in FIFRA which entitles a producer to registration of a pesticide is that the product has no "unreasonable adverse effects on the environment". 7 U.S.C.S. § 136a(c)(5)(D), (App. G at 92a). This standard "means any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C.S. § 136(bb) (App. G at 90a). This standard does not meet, much less abolish, the rights of the individual consumers to know and assess for themselves risks the product brings to them as individual users.

Chemical products are not subject to the consumer "kicking the tires" or "taking test rides". Regarding pesticides, consumers are totally "informationally dependent" on the truthfulness of the chemical producer. Certiorari is needed to determine whether FIFRA does impair the consumers' "right to know."

CONCLUSION

This case presents compelling reasons for this Court to issue a writ of certiorari. A United States Court of Appeals has decided issues relating to the federal preemption of state law remedies in a way which conflicts with a decision by a state court of last resort. The decision of the court below conflicts with relevant decisions of this Court. This case presents the opportunity for this Court to give much needed guidance to lower courts throughout the nation on whether, and if so to what extent, FIFRA bars state law remedies. Certiorari is needed to remedy unequal protection under the law, to protect the public's confidence in our judicial systems, to ascertain whether federal courts have deviated from their obligations regarding full faith and credit, and to protect the most basic rights of citizens — the "right to know."

Accordingly, the Petitioners respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED DECEMBER 5, 1997

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 96-1647 and 97-1657

CHARLES H. KUIPER, SR., MAE E. KUIPER, and CHARLES A. KUIPER, JR., d/b/a CHARLES H. KUIPER & SON FARMS,

Plaintiffs-Appellants,

v.

AMERICAN CYANAMID COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 93-C-566—**Rudolph T. Randa**, *Judge*.

ARGUED SEPTEMBER 4, 1997—DECIDED DECEMBER 5, 1997

Before CUDAHY, FLAUM, and DIANE P. WOOD, *Circuit Judges*.

FLAUM, *Circuit Judge*. This appeal requires us to decide whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y, preempts state law claims alleging that a pesticide manufacturer was negligent and made false representations in marketing and promoting its product. The district court entered summary judgment for the defendant manufacturer,

holding that FIFRA preempted the plaintiffs' claims and, in the alternative, that the state statute of limitations barred plaintiffs' statutory claim. We affirm.

I. Background

In the mid-1980s, American Cyanamid Corporation manufactured and marketed an herbicide named "SCEPTER." Pursuant to FIFRA, American Cyanamid registered SCEPTER with the Environmental Protection Agency (EPA), and EPA approved the SCEPTER label submitted by American Cyanamid.[1] The label contained a section on "Rotational Crop Restrictions" that told farmers how soon they could plant various crops on fields that had been treated with SCEPTER. Of particular significance for this case, the label stated that corn

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[1] FIFRA prohibits the sale of unregistered pesticides. 7 U.S.C. § 136a(a). To register a pesticide, manufacturers must submit to EPA "a complete copy of the labeling of the pesticide, a statement of all claims to be made for it, and any directions for its use," 7 U.S.C. § 136a(c)(1)(C), as well as supporting data, including "a full description of the tests made and the results thereof upon which the claims are based." *Id.* § 136a(c)(1)(F).

After reviewing the submitted information, EPA registers the pesticide if the following criteria are met:

> (A) its composition is such as to warrant the proposed claims for it;
>
> (B) its labeling and other material required to be submitted comply with the requirements of this subchapter;
>
> (C) it will perform its intended function without unreasonable adverse effects on the environment;
>
> (D) when used in accordance with widespread and commonly recognized practices it will not generally cause unreasonable adverse effects on the environment.

Id. § 136a(c)(5).

could be planted eleven months after the last application of SCEPTER.[2]

Charles H. Kuiper, Sr., Mae Kuiper, and Charles A. Kuiper, Jr., are farmers in Racine, Wisconsin. In 1987 and 1988, the Kuipers used SCEPTER to control weeds in their soybean fields. The Kuipers bought the herbicide from Donald Spangenberg, an independent dealer in agricultural supplies. Spangenberg told the Kuipers that SCEPTER was safe for follow corn.[3]

The Kuipers applied SCEPTER to their soybean fields in 1987 and planted corn on those same fields following the soybean harvest. Although they had waited eleven months after the last application of SCEPTER to plant their follow corn, as directed by the label, the 1988 corn crop did not do well. At the Kuipers' request, Donald Spangenberg came to inspect the fields, and the Kuipers also discussed the problem with an American Cyanamid representative.

In 1988, the Kuipers again applied SCEPTER to their soybean fields, and again their follow corn (the 1989 corn

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[2] The pertinent part of the label read as follows:

ROTATIONAL CROP RESTRICTIONS

The following rotational crops may be planted after applying SCEPTER at recommended rates in soybeans:

1. Four months after last SCEPTER application:
   - Small Grains
   - Rice
2. Eleven months after last SCEPTER application:

Corn	Grain sorghum
Cotton	Peanuts
Edible beans	Tobacco

[3] A "follow crop" is the crop that a farmer plants in a field following the previous planting season.

crop) grew poorly. The Kuipers complained to American Cyanamid for the second time, and the company admitted that it had received complaints from other farmers about damage to follow corn caused by SCEPTER. In December 1989, the Kuipers submitted a damage claim to American Cyanamid asserting their belief that SCEPTER had stunted their 1988 corn crop. In 1990, the Kuipers and American Cyanamid negotiated a settlement agreement. Although the parties discussed both the 1988 and 1989 crops, the final settlement compensated the Kuipers only for damages to the 1989 crop. The Kuipers continued to press American Cyanamid to pay damages for the 1988 crop until American Cyanamid, in a letter dated April 10, 1990, expressly denied them any further compensation.

The Kuipers finally filed suit against American Cyanamid in Wisconsin state court on April 30, 1993. Their complaint included a common-law negligence claim, a statutory fraudulent representation claim, and a request for punitive damages. American Cyanamid removed the case to the district court on diversity grounds, and the court entered summary judgment in favor of the defendant. The district court held that FIFRA preempts the Kuipers' claims and, in the alternative, that the three-year limitations period for statutory fraudulent representation claims had expired.

We review *de novo* a district court's decision to grant summary judgment, construing the evidence in the light most favorable to the Kuipers and drawing all reasonable inferences in their favor. *Maier v. Lucent Technologies, Inc.*, 120 F.3d 730, 734 (7th Cir. 1997).

II. Statute of Limitations

We start with the statute of limitations issue. We agree with the district court that the Kuipers filed

their statutory claim for fraudulent representation after the three-year limitations period had expired. Wis. Stat. § 100.18(11)(b). The allegedly fraudulent representation in this case occurred in 1987, when the Kuipers first purchased SCEPTER after being told it was safe for follow corn. However, the Kuipers did not file suit until April 30, 1993. The Kuipers contend that during the limitations period they did not have knowledge of American Cyanamid's wrongdoing sufficient to support a claim for fraudulent representation. They assert that American Cyanamid knew that SCEPTER was damaging follow crops throughout Wisconsin, but the company concealed this fact by resisting the discovery process in a trial involving similar claims to those asserted by the Kuipers in this case. *See Gorton v. American Cyanamid Co.*, 533 N.W.2d 746 (Wis. 1995) (affirming American Cyanamid's liability to a Wisconsin farmer after SCEPTER damaged the farmer's follow corn), *cert. denied*, 116 S. Ct. 753 (1996). Had American Cyanamid's guilty knowledge come to light earlier, the Kuipers argue, they would have been able to sue in a timely fashion. The Kuipers ask that we apply equitable principles to extend the limitations period in this case.

The record demonstrates, however, that the Kuipers had sufficient information to file suit within the limitations period, independent of any information discovered during the *Gorton* litigation. The Kuipers read the rotational crop restrictions on the label; they heard Donald Spangenberg's statement that SCEPTER is safe for follow corn; they observed damage suffered by their corn in two successive years following application of SCEPTER; and they even went so far as to approach American Cyanamid about SCEPTER's possible role in damaging their corn. The Kuipers suspected SCEPTER damage at least as early as December 1989, when they filed a claim with American Cyanamid for compensation for their

1988 crop. They also discussed the 1988 crop as part of their 1990 settlement negotiations, and they continued to press for reimbursement for the 1988 crop until they received American Cyanamid's letter, dated April 10, 1990, refusing their requests for compensation. In short, although the Kuipers may have been unaware at first that American Cyanamid knew SCEPTER could damage follow corn, the Kuipers had enough information to bring suit for fraudulent representation within the limitations period.

We also disagree with the Kuipers' contention that filing suit based on the information they had available to them within the limitations period would have violated Wisconsin's prohibition against frivolous suits. The standard under Wisconsin law is as follows:

> [A claim is frivolous] if there is no set of facts which could satisfy the elements of the claim, or if the party or attorney knows or should know that the needed facts do not exist or cannot be developed. That is, if the attorney knows or should reasonably know that the facts necessary to meet the required elements of an allegation are not present and cannot be produced, then the attorney has no cause of action.

Stern v. Thompson & Coates, Ltd., 517 N.W.2d 658, 667 (Wis. 1994) (citation omitted). Contrary to the Kuipers' suggestion, we do not interpret this standard to mean that plaintiffs must have in hand all the information necessary to prove their claims before they may file suit; such a reading would give no role to the discovery process in collecting evidence—such as the extent of a defendant's guilty knowledge—that is currently in the possession of the opposing party. As discussed, the Kuipers had ample cause to believe, within the limitations period, that a set of facts indicating fraudulent representation by American Cyanamid existed or could be developed.

Accordingly, we affirm the district court's holding that the statute of limitations bars the Kuipers' statutory claim for fraudulent representation.

The Kuipers' remaining negligence claim and request for punitive damages allege that American Cyanamid "was negligent regarding SCEPTER in that, notwithstanding contrary representations by it, defendant . . . knew or should have known that SCEPTER is likely to carry over to the following year's crops and adversely affect them," and furthermore, that American Cyanamid "acted in reckless disregard" of the Kuipers' rights. Plaintiff's Complaint at 3. These claims, which seem to overlap to some extent with the Kuipers' statutory fraudulent representation claim, are not subject to the three-year limitations period of § 100.18. Instead, they are subject to a six-year limitations period. Wis. Stat. § 893.52. Accordingly, we must determine whether these claims are preempted by FIFRA.

III. FIFRA Preemption

The Kuipers contend that their claims fall outside the range of state-law causes of action that are preempted by FIFRA. They argue that FIFRA preempts only state-law claims that directly challenge the product label; therefore, FIFRA does not preempt their complaint that American Cyanamid was negligent in making *off-label* misrepresentations regarding SCEPTER. Furthermore, if their claims are construed as direct challenges to the label, the Kuipers suggest that their claims would still survive preemption because the label would then have to be deemed misbranded. For the reasons given below, we reject these arguments and conclude that FIFRA preempts the Kuipers' causes of action. Before engaging in this discussion, however, we must address the threshold question of whether the FIFRA preemption issue is open to resolution by this court.

Appendix A

A.

The Kuipers argue that we should not address the merits of the preemption issue because *Gorton v. American Cyanamid Co.*, 533 N.W.2d 746 (Wis. 1995), *cert. denied*, 116 S. Ct. 753 (1996), has issue preclusive effect. In *Gorton*, a Wisconsin farmer successfully sued American Cyanamid for negligent misrepresentation after SCEPTER damaged his follow corn. The Wisconsin Supreme Court ruled that FIFRA did not preempt the *Gorton* plaintiff's suit.

The Kuipers, relying primarily on *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 82 (1984), and *Marx v. M & I Bank*, 17 F.3d 1012, 1014 (7th Cir. 1994), argue that we are required to give *Gorton* the same full faith and credit that it would receive in Wisconsin courts under Wisconsin law. This argument raises thorny questions about whether *Migra* requires a federal court to abide by a state court's decision on the issue of federal preemption of state-law causes of action, or whether an implied exception exists to the Full Faith and Credit Act, 28 U.S.C. § 1738, that would nullify issue preclusion here. *See Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 878 (1996) (discussing the possibility of implied exceptions to the Full Faith and Credit Act). We need to decide this difficult issue, however, only if we first conclude that *Gorton* would have issue preclusive effect under state law. *Id.*; *Migra*, 465 U.S. at 82. Because *Gorton*'s holding on preemption would not have issue preclusive effect on the Kuipers' claims under Wisconsin law, we reject the Kuipers' contention that we are bound by *Gorton*.

Wisconsin permits nonmutual offensive collateral estoppel only in cases in which issue preclusion would meet a "fundamental fairness" standard. *Michelle T. v. Crozier*, 495 N.W.2d 327, 331 (Wis. 1993). Under this fundamental fairness test, issue preclusion is inappropriate here for two reasons. First, the Kuipers' claims in-

volve different alleged misrepresentations than those at issue in *Gorton*, and, as discussed *infra*, FIFRA preemption analysis turns in part on how far the particular alleged misrepresentations stray from the information contained in the product label. *See State ex rel. Flowers v. Department of Health and Soc. Serv.*, 260 N.W.2d 727, 734 (Wis. 1978) (issue preclusion applies "where the controlling facts . . . remain unchanged") (quoting *C.I.R. v. Sunnen*, 333 U.S. 591, 599, 600 (1948)) (emphasis omitted). Second, as also discussed *infra*, *Gorton* conflicts with other FIFRA preemption cases. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979) ("Allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant."). Thus, *Gorton* does not have issue preclusive effect on this case, and we must address the merits of the FIFRA preemption question.

B.

The Federal Insecticide, Fungicide, and Rodenticide Act provides that a "State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA]." 7 U.S.C. § 136v(b). Because this express preemption provision "provides a reliable indicium of congressional intent with respect to state authority," *see Freightliner Corp. v. Myrick*, 115 S. Ct. 1483, 1488 (1995) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (internal quotation omitted)), there is no need to engage in any implied preemption analysis. *See Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2250-51 (1996); *Freightliner*, 115 S. Ct. at 1488; *Cipollone*, 505 U.S. at 517. Our task is to "identify the domain expressly preempted" by the statutory language, *Medtronic*, 116 S. Ct. at 2250 (quoting *Cipollone*, 505 U.S. at 517), by deter-

mining whether the legal duty that is the predicate of the plaintiffs' state law damages actions constitutes a "requirement for labeling or packaging in addition to or different from those required under [FIFRA]." *See Cipollone*, 505 U.S. at 524 (1992) (opinion of Stevens, J., joined by Rehnquist, C.J, and White and O'Connor, JJ.); 505 U.S. at 531-32 (opinion of Blackmun, J., joined by Kennedy and Souter, JJ.) (holding that the preemptive scope of the Federal Cigarette Labeling and Advertising Act and the Public Health Cigarette Smoking Act is governed entirely by the language of their express preemption provisions).

We have previously held that FIFRA preempts state common-law actions for labeling and packaging defects regarding products, like SCEPTER, that are regulated by FIFRA. *See Shaw v. Dow Brands*, 994 F.2d 364, 371 (7th Cir. 1993) (FIFRA preempts state law failure to warn claim). Our sister circuits agree that FIFRA preempts state law claims that directly challenge the product label itself. *Grenier v. Vermont Log Buildings, Inc.*, 96 F.3d 559, 563-65 (1st Cir. 1996) (failure to warn claim; affirmative misstatement/breach of express warranty claim; misdesign or manufacture claim based solely on failure to warn); *Welchert v. American Cyanamid Co.*, 59 F.3d 69, 71-73 (8th Cir. 1995) (express warranty claim); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 560 (9th Cir. 1995) (failure to warn claim; negligent testing claim where only evidence produced is allegedly inadequate product labels); *Bice v. Leslie's Poolmart*, 39 F.3d 887, 888 (8th Cir. 1994) (failure to warn); *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1025 (5th Cir. 1994) (failure to label properly; failure to warn); *Worm v. American Cyanamid Co.*, 5 F.3d 744, 748 (4th Cir. 1993) (failure to warn; breach of express and implied warranties; negligent testing claim where only evidence produced is allegedly inadequate product labels); *King v. E.I. Dupont de Nemours & Co.*, 996 F.2d 1346, 1349 (1st Cir.) (failure to warn), *cert. dismissed*, 510 U.S. 985 (1993); *Papas v.*

Upjohn Co., 985 F.2d 516, 518 (11th Cir.) (negligence, strict liability, and implied warranty claims, all of which relied on allegedly inadequate labeling), *cert. denied sub nom. Papas v. Zoecon Corp.*, 510 U.S. 913 (1993); *Arkansas-Platte & Gulf v. Van Waters & Rogers, Inc.*, 959 F.2d 158, 162 (10th Cir.) (strict liability and negligence claims alleging failure to warn), *vacated sub nom. Arkansas-Platte & Gulf v. Dow Chemical Co.*, 506 U.S. 910 (1992), *and aff'd on remand sub nom. Arkansas-Platte & Gulf v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir.), *and cert. denied sub nom. Arkansas-Platte & Gulf v. Dow Chemical Co.*, 510 U.S. 813 (1993).

However, the Kuipers maintain that none of this authority applies, for their suit does not allege a labeling or packaging defect. Instead, they claim that when they purchased SCEPTER they relied on various representations—quite apart from the label—that SCEPTER is "safe" for follow corn. The Kuipers contend that these representations "are not stated on the label nor in the labeling," Appellant's Br. at 31, and they further assert that "the district court erred in finding that [the defendant's] advertising and SCEPTER's label and labeling are substantially the same." *Id.* at 30.

The Kuipers cannot automatically avoid FIFRA preemption simply because they challenge alleged misrepresentations that were made separately from the label. Our sister circuits have held that even off-label statements are preempted if they merely repeat information in the label itself. According to the Fourth Circuit, when advertising or promotional materials merely repeat information or language contained in the label, claims directed at the advertising necessarily challenge the label itself and are therefore preempted. *Lowe v. Sporicidin Int'l*, 47 F.3d 124, 130 (4th Cir. 1995); *Worm*, 5 F.3d at 748. The Ninth and Eleventh Circuits go farther, holding that "any claims that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn the plaintiff necessarily challenge

the adequacy of the warnings provided on the product's labeling or packaging" and therefore are preempted. *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 561 (9th Cir. 1995) (quoting *Papas v. Upjohn Co.*, 985 F.2d 516, 519 (11th Cir.), *cert. denied sub nom. Papas v. Zoecon Corp.*, 510 U.S. 913 (1993)). Under both approaches, FIFRA preempts state law claims when the challenged advertising merely reiterates the label. The difference is that the Fourth Circuit holds that FIFRA allows state law claims against advertisements that "substantially differ" from the label, *Lowe*, 47 F.3d at 130, while the Ninth and Eleventh Circuits hold that FIFRA preempts these claims as well.

We do not need to choose between these two approaches in this case, for FIFRA preempts the Kuipers' claims under either rule. For the reasons discussed below, we conclude that the alleged misrepresentations relied on by the Kuipers essentially repeat the follow crop restrictions on SCEPTER's label. In challenging the alleged misrepresentations, the Kuipers challenge the label itself, and hence their claims are preempted.

C.

To assess the Kuipers' contention that they challenge only off-label representations, we must identify the particular representations at issue. The Kuipers claim that American Cyanamid knowingly made a variety of misrepresentations in its advertising and promotional materials to the effect that SCEPTER was safe or extremely safe for follow corn. We do not need to consider these materials, however, because the Kuipers concede that they never saw any of them prior to purchasing and using SCEPTER. Def.'s Br. in Opp. to Plaintiff's Motion for Imposition of Collateral Estoppel at A-67 (deposition of Charles A. Kuiper, Jr.), A-58 (deposition of Charles H. Kuiper, Sr.). In fact, the Kuipers report that they heard only a single alleged off-label misrepresentation about

SCEPTER: Donald Spangenberg's statement that SCEPTER is "safe" for follow corn. *Id.* at A-201 (deposition of Charles A. Kuiper, Jr.); Plaintiff's Supp. Br. Opp. M. Summ. J. at 8 n.5. The district court found that "[t]his representation, of course, simply reiterates the sum and substance of the representation found on the label and read by the Kuipers, *i.e.*, that it was safe to plant corn as a follow crop 11 months after a SCEPTER application." *Kuiper v. American Cyanamid Co.*, 913 F. Supp. 1236, 1244-45 (E.D. Wis. 1996).[4]

In an attempt to situate their claim under *Lowe*'s protective umbrella, the Kuipers argue that Spangenberg's statement "substantially differs" from the statements in the label. They point out that under FIFRA, EPA "shall register a pesticide" if, among other requirements, the agency finds that the pesticide "will perform its intended function without unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5). Thus, the Kuipers argue, the label's rotational crop restriction means only that planting follow corn eleven months after applying SCEPTER will not have unreasonable adverse

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[4] The district court also recognized that the Kuipers face a potential difficulty in proving causation in their suit against American Cyanamid. The Kuipers' theory on causation appears to be that Spangenberg, in recommending SCEPTER and representing that it is safe for follow corn, relied on misleading advertisements and other promotional materials issued by American Cyanamid. Even assuming *arguendo* that Spangenberg was duped by other materials issued by American Cyanamid into thinking that SCEPTER is a good product, it does not follow that the information that Spangenberg actually transmitted to the Kuipers—that SCEPTER is safe for follow corn—was false or deceptive. Because we conclude that Spangenberg's statement merely repeats information contained in the label itself, the Kuipers' claims are preempted even if Spangenberg was influenced by false information when he made the statement.

effects *on the environment*; it does not mean that there will be no adverse effects on the follow corn itself, as Spangenberg suggested. Furthermore, at oral argument, the Kuipers argued that if we equate the label's rotational crop restriction with Spangenberg's statement that SCEPTER is "safe" for follow corn, then we must conclude that SCEPTER is misbranded.[5] Approving a label that says SCEPTER is "safe" for follow corn would exceed EPA's authority under FIFRA, which discusses only adverse effects on the environment.

This argument requires us to determine what message EPA conveys when it approves rotational crop restrictions on a pesticide's label. The Kuipers argue that whatever the restrictions on the label mean, they definitely do not mean that the pesticide (used properly) poses no threat to follow crop yields. If the Kuipers are correct, then Spangenberg's statement that SCEPTER is "safe" for follow corn significantly departs from the label, and therefore the Kuipers' claims would not be preempted under the rule in *Lowe*. However, we believe that the Kuipers' argument rests on an inaccurate interpretation of FIFRA and EPA's implementing regulations.

The Kuipers' claim that FIFRA requires EPA to consider only adverse effects on the environment, and not adverse effects on follow corn, cannot succeed in light of FIFRA's definition of "environment" to include "water, air, land, and *all plants* and man and other animals living therein, and the interrelationships which exist among these." 7 U.S.C. § 136(j) (emphasis added). Follow corn is a plant and falls within this definition. Thus, the statutory language suggests that when EPA approved the rotational crop restriction on SCEPTER's label, EPA

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[5] A pesticide is misbranded if, among other things, "its labeling bears any statement . . . which is false or misleading in any particular." 7 U.S.C. § 136(q)(1)(A).

expressed its belief that planting follow corn eleven months after application of SCEPTER would have no unreasonable adverse effects on the environment, including the follow corn itself.

In addition, EPA's regulations support our view of the statutory language and refute the Kuipers' argument that SCEPTER would be misbranded if its label is understood to include a claim that the pesticide is no threat to follow corn. The labeling regulations demonstrate that EPA considers several factors in approving rotational crop restrictions for a pesticide, including the effect of the pesticide on follow crops. EPA requires rotational crop restrictions in part to guard against dangerous accumulation of pesticides in the food supply, which could occur if follow crops absorb a pesticide that remains in the soil too long. *See* 40 C.F.R. § 158.202(6). EPA's regulations also address, however, the damage that a pesticide might cause to the follow crops themselves, in terms of reduced crop yields or other harm:

> Hazard to nontarget organisms—
>
> The information required to assess hazards to nontarget organisms [is] derived from tests to determine pesticidal effects on birds, mammals, fish, terrestrial and aquatic invertebrates, *and plants*. . . . A purpose common to all data requirements is to provide data which determines the need for (and appropriate wording for) precautionary label statements to minimize the potential adverse effects to nontarget organisms.

Id. § 158.202(h)(1) (emphasis added). The risk that a pesticide will reduce crop yields or stunt growth (*i.e.*, create "hazards" or "adverse effects") in follow crops (*i.e.*, "nontarget organisms") fits squarely within this section. Harm to follow crops is one of the risks that EPA considers in its label approval process; it is therefore consistent with this regulation to conclude that EPA's

approval of SCEPTER's rotational crop restrictions represents the agency's determination, based on the data submitted by American Cyanamid, that SCEPTER will not harm follow crops if used according to the label.

The regulations on misbranding initially seem to cut the other way, in support of the Kuipers' claim that a pesticide whose label says it is "safe" for follow corn would be misbranded:

> Examples of statements or representations in the labeling which constitute misbranding include . . . [c]laims as to the safety of the pesticide or its ingredients, including statements such as "safe," "nonpoisonous," "noninjurious," "harmless" or "nontoxic to humans and pets" . . . .

Id. § 156.10(a)(5). When viewed in context, however, even this regulation fails to support the Kuipers' interpretation. EPA prohibits use of the word "safe" in product labels to ensure that labels do not give product users a false sense of *personal* safety by promising that the pesticide is "noninjurious" or "nontoxic" to the users themselves (or to their pets). Thus, although this regulation would prevent SCEPTER's label from claiming that the pesticide was "safe" in terms of the personal health and safety of those who use or are exposed to it, we do not read the regulation as prohibiting labeling claims to the effect that SCEPTER poses no threat of damage to follow corn.

Spangenberg's statement that SCEPTER is "safe" for follow corn was made in this second sense—*i.e.*, that the pesticide posed no threat to follow corn. The Kuipers do not contend that they thought Spangenberg was referring to their own personal safety as SCEPTER users; nor did they claim any personal injuries from use of SCEPTER. Because Spangenberg's comment does not make the sort of personal health or safety claim barred by 40 C.F.R. § 156.10(a)(5), our decision that his comment is

equivalent to the rotational crop restriction in SCEPTER's label does not entail the conclusion that the pesticide is misbranded.

In sum, based on our reading of the statutory language and the regulations, we conclude that the rotational crop restrictions approved by EPA are based—among other factors—on an assessment that planting follow corn eleven months after applying SCEPTER will not harm the follow corn. We therefore do not believe that Spangenberg's statement that SCEPTER is "safe" for follow corn substantially differs from the rotational crop restriction on the label.[6] Because Spangenberg's statement essentially repeats the restrictions on the label, the Kuipers' claims challenging his statement necessarily challenge the label itself and are therefore preempted.

D.

Furthermore, even if we were to agree with the Kuipers that EPA exceeded its authority in approving SCEPTER's label, and therefore agree that SCEPTER is misbranded, FIFRA would still preempt the Kuipers' claim. A state tort claim premised on misbranding arguably might appear to be protected from preemption under the Fourth Circuit's rule authorizing state common

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[6] Because we conclude that the alleged misrepresentation here does not substantially differ from the information in the label, we express no opinion on the Fourth Circuit's rule that FIFRA permits state-law claims challenging representations that do substantially differ from the label. *See Lowe v. Sporicidin Int'l*, 47 F.3d 124, 130 (4th Cir. 1995); *see also Cipollone v. Liggett Group*, 505 U.S. 504, 528-29 (opinion of Stevens, J., joined by Rehnquist, C.J., and White and O'Connor, JJ.) (holding that similar preemption provision in § 5 of the Public Health Cigarette Smoking Act of 1969 does not preempt state-law fraudulent misrepresentation claims based on false statements of material fact made in advertisements).

law actions to enforce FIFRA's own requirements: "[I]f 'a state elects to recognize [that] a breach of a FIFRA-created duty forms the basis for a state remedy . . . it is permitted to do so by 7 U.S.C. § 136v(b).'" *Lowe v. Sporicidin Int'l*, 47 F.3d 124, 128 (4th Cir. 1995) (quoting *Worm v. American Cyanamid Co.*, 5 F.3d 744, 748 (4th Cir. 1993)). However, the Fourth Circuit expressly limits this rule to common-law actions that do not challenge an EPA-approved label. As the court stated in *Worm*:

> The Worms' argument that their state law claims are based on duties not inconsistent with those imposed by FIFRA has no merit. Because the language on the label was determined by the EPA to comply with the federal standards, to argue that the warnings on the label are inadequate is to seek to hold the label to a standard different from the federal one. . . .
>
> If a state elects to recognize that a breach of a FIFRA-created duty forms the basis for a state remedy, we have held that it is permitted to do so by 7 U.S.C. § 136v(b). Allowing such actions, however, is substantially distinguishable from accepting the argument that the state common law duty to warn is not "in addition to or different from" the federally defined duty.

5 F.3d at 748 (footnote and citations omitted). Although this statement is directed at common-law failure to warn claims, the same principle holds true for misbranding claims, which challenge the label even more directly. *See Welchert v. American Cyanamid Co.*, 59 F.3d 69, 73 (8th Cir. 1995) (preempting state-law claim because to allow plaintiffs' "claim challenging the accuracy of the herbicide label's federally-mandated and approved statement . . . would be to allow state courts to sit . . . as super-EPA review boards that could question the adequacy of the EPA's determination of whether a pesticide registrant successfully complied with . . . its own regula-

tions"); *Papas v. Upjohn Co.*, 985 F.2d 516, 518 (11th Cir.) (rejecting common law liability for alleged misbranding because "it is for the EPA Administrator, not a jury, to determine whether labelling and packaging information is complete or inaccurate, and if so what label changes, if any, should be made"), *cert. denied*, 510 U.S. 913 (1993). In short, FIFRA does not allow states to second-guess EPA's labeling decisions under the guise of enforcing the requirements of FIFRA itself.

To conclude, we hold that FIFRA preempts the Kuipers' claims because the alleged misrepresentation that SCEPTER is "safe" for follow corn essentially restates the rotational crop restriction on the label. Furthermore, even if EPA had exceeded its statutory authority in approving SCEPTER's label, and therefore SCEPTER were misbranded, FIFRA still would preempt the Kuipers' state law claims because they impermissibly challenge the label.

IV. Conclusion

Because the Kuipers' statutory fraudulent representation claim is barred by the statute of limitations and their remaining claims are preempted by FIFRA, we affirm the district court's entry of summary judgment in favor of American Cyanamid.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FILED FEBRUARY 15, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 93-C-566

CHARLES H. KUIPER, SR., et. al.,

Plaintiff(s),

v.

AMERICAN CYANAMID CO.,

Defendant(s).

DECISION AND ORDER

This matter comes before the Court on defendant's motions to dismiss and/or for summary judgment. For the following reasons, both motions are granted and the case dismissed.

FACTS

The undisputed facts are as follows. The defendant, American Cyanamid Company ("ACC"), manufactured and marketed a herbicide known as SCEPTER during the 1980's. (Plaintiffs' Memorandum Opposing Motion for Summary Judgment (Plaintiffs' Memo.") at 1.) SCEPTER was designed to control the growth of weeds in soybean crops. (Id.) It was first sold for general use in the midwest in 1986 and was offered for sale in Wisconsin in 1987. (Id.) The plaintiffs, Charles H.

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Kuiper, Sr., Mae E. Kuiper and Charles A. Kuiper, Jr., all doing business as Charles H. Kuiper & Son Farms (collectively, "the Kuipers"), first purchased SCEPTER in 1987 and incorporated it into their soybean fields that same year. (Id.) The Kuipers purchased the product from Donald Spangenberg of Farmers Grain & Supply ("Farmers Grain"), an independent dealer in agricultural supplies. (Id.) Prior to their purchase and use of the product in 1987, the Kuipers had not seen any of ACC's advertising or promotional materials regarding SCEPTER, other than the SCEPTER label itself. (See, ACC Reply Brief in Support of Motion for Summary Judgment ("ACC MSJ Reply") at 3, fn.3., Ex. A at 58, 67-68.) The "Rotational Crop Restrictions" portion of the label stated that "follow" corn could be planted 11 months after the last SCEPTER application. (Id. at 4.) In addition, Spangenberg generally recommended the product, and allegedly made the specific representation that it was safe for "follow" corn. (Plaintiffs' Supplemental Brief Opposing Motion for Summary Judgment (Plaintiffs' Brief") at 8, fn. 5; Bichler Supp'l Aff., Ex. A. at 203.)

The references to "follow" corn relate to what is known in the farming trade as a "follow crop". Farmers like the Kuipers consistently rotate the crops they plant from one season to the next. (Plaintiffs' Memo at 1.) A "follow crop" is the crop which the farmer intends to plant in a given field during the season following the current planting season. Thus, when purchasing herbicides for a given crop and season, one of the farmer's typical concerns is whether or not that herbicide poses any risks to the potential "follow crops" which might be planted the following season. In this case, the Kuipers intended to (and did) plant corn as the 1988 "follow crop" to their 1987 soybean crop. (Id.) The corn was planted in fields in which SCEPTER was applied during the 1987 season. (Id. at 1-2.)

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In June of 1988, field corn which had been planted in fields treated with SCEPTER the preceding year showed damage. (Id. at 2.) Upon seeing the damage, the Kuipers suspected it was the result of "carryover" problems with SCEPTER, "carryover" being a reference to injuries to follow crops from a prior year's herbicide application. (ACC Memorandum in Support of Motion to Dismiss ("ACC MTD"), Ex. A at 10, 18.) They had previously heard rumors to that effect about SCEPTER and had now observed damage to their own crops. (Id.) Accordingly, the Kuipers called Don Spangenberg, who came out to their farm and looked at their fields. (Id.) The Kuipers had asked Spangenberg to bring an ACC representative with him to view the fields, but it is unclear whether he did so. (Id. at 22.) The Kuipers did, however, discuss the problem with an ACC rep in 1988. (Id. at 20.)

The Kuipers also applied SCEPTER to their 1988 soybean fields. (Plaintiffs' Memorandum Opposing Motion to Dismiss at 1.) In 1989, they again rotated the soybean fields to corn and again experienced damage to the corn crop. (Id.; ACC MTD at 1-2.) The Kuipers contacted both Spangenberg and ACC, and this time representatives from both Farmers Grain and ACC inspected the affected corn crops. (ACC MTD, Ex. A at 22, 47.) During that 1989 inspection, the ACC representative admitted to the Kuipers that ACC was experiencing "big problems" with SCEPTER vis-a-vis follow corn and that SCEPTER was probably a factor in the damage to their 1989 corn crop. (Id.; Bichler Supp'l Aff. at Ex. C.) Settlement discussions ensued between the parties, and in 1990 ACC agreed to compensate the Kuipers for the damage done to their 1989 corn crop. (ACC MTD, Ex. A at 51.) Although the settlement only resolved the Kuipers claims with respect to their 1989 corn crop, it is undisputed that the parties also discussed at that

time the possibility that SCEPTER had damaged their 1988 corn crop. (Id. at 52-53.) Indeed, on December 26, 1989, the Kuipers sent a damage claim to ACC itemizing the alleged "SCEPTER DAMAGE TO 1988 CORN CROP". (Id. at 92; Bichler Supp'l Aff., Ex. E.) This was followed by a March 27, 1990 claim letter to ACC, stating that the Kuipers, after seeing the SCEPTER damage to their 1989 corn crop, "now realize[d] that the same symptons [sic] and results were present in our 1988 corn crop." (Bichler Supp'l Aff., Ex. G.) The Kuipers asserted a loss of $118,278.87 due to SCEPTER carryover damage and enclosed a letter from Don Spangenberg of Farmers Grain in support of their claim. (Id.) The claim was rejected by ACC in a letter dated April 10, 1990. (Id., Ex H.)

The Kuipers started this lawsuit over three years later, on April 30, 1993. The complaint alleges state common law and statutory causes of action for negligent misrepresentation, deceptive advertising, and punitive damages. ACC moves for summary judgment on all three claims on grounds of federal preemption and moves to dismiss the statutory claim on statute of limitations grounds. Because the motion to dismiss relies on factual materials outside of the initial pleadings, it shall also be treated as a motion for summary judgment.

LAW

I. SUMMARY JUDGMENT STANDARDS

> Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

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Summary judgment is no longer a disfavored remedy. "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Id.*, at 327. It "can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those that really do raise genuine issues of material fact." *United Food and Commercial Workers Union Local No. 88 v. Middendorf Meat Co.*, 794 F. Supp. 328, 330 (E.D.Mo. 1992). Thus, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). While a *material* fact is one that is "outcome determinative under the governing law", *Whetstine v. Gates Rubber Co.*, 895 F.2d 388, 392 (7th Cir. 1990), a *genuine* issue as to that material fact is raised only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

The question whether a material issue of fact is *genuine* necessarily requires "some quantitative determination of sufficiency of the evidence." Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D.

183, 186 (1987). "Of course, a court still cannot resolve factual disputes that could go to a jury at trial, . . . [b]ut no longer need the trial court leave every sufficiency issue for trial or a later directed verdict motion." *Id.* Rather, the standard for summary judgment is now the same as that for a directed verdict: "[W]hether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52. "A district judge faced with [a summary judgment motion] must decide; subject of course to plenary appellate review, whether the state of the evidence is such that, if the case were tried tomorrow, the plaintiff would have a fair chance of obtaining a verdict. If not, the motion should be granted and the case dismissed." *Palucki v. Sears, Roebuck & Co.*, 879 F.2d 1568, 1572-73 (7th Cir. 1989) (citations omitted). Thus, a party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corporation*, 475 U.S. 574, 586 (1986). "[A] party must produce 'specific facts showing that there remains a genuine issue for trial' and evidence 'significantly probative' as to any [material] fact claimed to be disputed." *Branson v. Price River Coal Company*, 853 F.2d 768,771-72 (10th Cir. 1988). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50. Such principles insure that summary judgment is utilized "when it can be shown that a trial would serve no useful purpose." *Windham v. Wyeth Laboratories, Inc.*, 786 F. Supp. 607, 610 (S.D.Miss. 1992).

Appendix B

II. APPLICATION

A. Preemption

The principle issue in this case is whether the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y, preempts the Kuipers' state law causes of action. FIFRA provides comprehensive regulation of the sale and use of pesticides and other chemicals and includes, among other things, certain licensing and labeling requirements. There is a substantial body of case law dealing with preemption issues arising under FIFRA. The Court will not undertake a full exposition of that case law. For purposes of this motion, it suffices to say that FIFRA contains an express preemption clause which several circuit courts of appeals, including the 7th Circuit, have interpreted as preempting state common law causes of action, including "failure to warn" claims, premised upon or relating to defects in the labeling or packaging of a product regulated under FIFRA. The preemption provision, and the pertinent cases interpreting it, are as follows:

> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. §136v(b). *See, Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 369-71 (7th Cir. 1993); *see also, MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1023-26 (5th Cir. 1994); *Worm v. American Cyanamid Co.*, 5 F.3d 744,746-49 (4th Cir. 1993) (*"Worm II"*); *King v. E.I. DuPont De Nemours & Co.*, 996 F.2d 1346,1347-51 (1st Cir. 1993); *Papas v. Upjohn Co.*, 985 F.2d 516, 517-20 (11th Cir. 1993) (*"Papas II"*); *Arkansas-Platte &*

Gulf v. Van Waters & Rogers, Inc., 981 F.2d 1177, 1178-80 (10th Cir. 1993); *Bice v. Leslie's Poolmart, Inc.*, 39 F.3d 887, 888 (8th Cir. 1994); *Taylor AG Industries v. Pure-Gro*, 54 F.3d 555, 559-61 (9th Cir. 1995). Thus, insofar as the Kuipers' claims are premised upon inaccuracies or falsehoods contained in SCEPTER's labeling or packaging, such claims are clearly preempted by FIFRA.

This case, however, is not resolved so easily. The Kuipers argue that they are not relying upon any deficiencies in SCEPTER's labeling and packaging and are not asserting any "failure to warn" claims based on that labeling and packaging. Rather, the Kuipers are asserting misrepresentation claims based on false statements contained in ACC's advertising and promotional materials; specifically, representations regarding SCEPTER's safety vis-a-vis follow crops. Because the FIFRA provision at issue only discusses "requirements for *labeling* or *packaging* in addition to or different from those required" under FIFRA, the Kuipers argue that any claims based on misrepresentations in SCEPTER's advertising are not preempted. The 7th Circuit has yet to address this issue in the context of FIFRA. Other state and federal courts have, however, and there appears to be a split developing.

The Kuipers rely primarily on the Wisconsin Supreme Court's recent decision in *Gorton v. American Cyanamid Co.*, 533 N.W.2d 746 (Wis.1995). *Gorton* involved facts virtually identical to those alleged here. Gorton, the plaintiff, was a farmer who had applied SCEPTER to his 1987 and 1988 soybean crops. Like the Kuipers, Gorton planted corn as a follow crop in the spring of 1988, and by June of that year it was evident that the corn was not growing properly. In February of 1990, at or around the time in which the Kuipers were settling their

1989 crop claim, Gorton filed suit against ACC alleging a number of theories, including negligent misrepresentation concerning SCEPTER's safety vis-a-vis follow crops. In defense, ACC argued that FIFRA preempted Gorton's state common law tort claims. Like the Kuipers, Gorton argued, *inter alia,* that FIFRA does not preempt misrepresentation claims relating to ACC's advertising or marketing materials. The Wisconsin Supreme Court agreed with Gorton:

> We follow the *Cipollone* reasoning on this point and hold that Gorton Farms' claim based on misrepresentation survives preemption under FIFRA. We see nothing in FIFRA that seeks to overturn the longstanding rules governing misrepresentation. On the contrary, FIFRA simply seeks uniformity in labeling and packaging and mandates that states shall not impose labeling or packaging requirements other than those prescribed by the statute itself. Further, our reading of sec. 136v(b) leads us to conclude that its preemptive effect does not encompass the general duty not to make false statements. Quite simply, claims based on misrepresentations of fact do not challenge the labeling of a manufacturer's product.
>
> Here, Gorton Farms presented evidence that American Cyanamid made representations that SCEPTER was safe to follow corn. These representations were made through written product such as promotional materials, advertisements, technical reports, as well as through oral statements made by American Cyanamid's technical service representatives. All of the statements assuring that

> SCEPTER was "safe" and "extremely safe" had no relation to the labeling or packaging of the herbicide. Gorton Farms also presented evidence that American Cyanamid internal documents unequivocally showed that SCEPTER caused damage to follow corn crops in a variety of circumstances and yet, the company failed to disclose any information other than assertions that SCEPTER was safe to follow corn.

Gorton, 533 N.W.2d at 755-56. At least one federal district court and one state appellate court appear to agree with *Gorton*'s conclusion. *See e.g., Burke v. Dow Chemical Co.*, 797 F. Supp. 1128, 1140-41 (E.D.N.Y. 1992); *Malone v. American Cyanamid Co.*, 649 N.E.2d 493, 498-99 (Ill.App.Ct. 1995).

Other federal and state courts have reached the opposite conclusion, however, at least in cases where the alleged falsehoods or defects in the advertising materials are identical to language contained in the EPA-approved label or package. The *Worm II* case, for example, involved a farmer who applied SCEPTER to a soybean crop in 1987 and experienced damage to a follow corn crop in 1988. As here, the plaintiff alleged that both the SCEPTER label *and* ACC promotional materials stated that corn could be safely planted 11 months after application of the SCEPTER herbicide. The plaintiff asserted several claims against ACC, including state common law claims for negligent marketing and failure to warn. The latter claims stemmed from representations and/or omissions found in SCEPTER's "point-of-sale" or other promotional materials regarding crop rotation and SCEPTER's safety vis-a-vis follow crops. On summary judgment, the district court dismissed the latter two claims, holding that any claims based upon representations made on

the SCEPTER label, "or in the materials accompanying the product", were preempted by FIFRA. The 4th Circuit agreed:

> The Worms also argue that even if American Cyanamid could not add language to its label, it could comply with any common law duty through statements made in other ways, for example through point-of-sale notices. To allow the Worms to argue that the warning language which appears on point-of-sale or other promotional material is inadequate when that language is identical to that approved by the EPA would in effect allow the establishment of an additional or different state law requirement concerning adequate warning language.

Worm II, 5 F.3d at 748.

In *Papas II*, the plaintiff claimed he was injured by exposure to a pesticide regulated by FIFRA. He raised, *inter alia*, various state law failure-to-warn claims and argued that any such claims — "unrelated to labeling and packaging" — were not preempted by FIFRA. *Papas II*, 985 F.2d at 519. The 11th Circuit disagreed:

> [Appellants] contend that because the language of 136v refers only to "labeling or packaging," the section does not preempt failure to warn claims based on point-of-sale signs, consumer notices, or other informational materials that are "unrelated" to labeling and packaging. But any claims that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn the plaintiff necessarily challenge the adequacy of the

> warnings provided on the product's labeling or packaging. If a pesticide manufacturer places EPA-approved warnings on the label and packaging of its product, its duty to warn is satisfied, and the adequate warning issue ends. Plaintiffs may not interfere with the FIFRA scheme by bringing a common law action alleging the inadequacy of, for example, point-of-sale signs. Because claims challenging the inadequacy of warnings on materials other than the label or package of a product necessarily imply that the labeling and packaging failed to warn the user, we conclude that these claims are also preempted by FIFRA.

Id.

The 4th Circuit discussed the issue a second time in *Lowe v. Sporicidin*, 47 F.3d 124 (4th Cir. 1995). In *Lowe*, the plaintiff alleged she was injured by using defendant's disinfectant, a product which fell within the regulatory scope of FIFRA. Plaintiff raised a variety of legal theories, including failure to warn and negligent marketing, but eventually characterized her claims, much like the Kuipers do here, as stemming from misrepresentations contained in the defendant's advertising, as opposed to the product's label or packaging. *Id.* at 127. The district court dismissed the claims as preempted by FIFRA. The 4th Circuit, in discussing the preemption issue, first clarified the analysis contained in its *Worm II* decision:

> The Worm analysis obviously makes it clear that some claims are preempted by FIFRA. First, any state law claim that would require the defendant to alter its EPA-approved warning label, labeling, or

> packaging to avoid liability is preempted. *Second, a failure to warn claim that contends that the same language that constitutes an EPA-approved label, labeling, or packaging is inadequate is preempted whether that language appears on a label, labeling, packaging, or elsewhere.* Third, an express warranty claim based on EPA-approved labeling materials is preempted.

Id. at 129 (emphasis supplied; citations omitted). As for claims specifically based on the content of a defendant's advertising, which the 4th Circuit characterized as either "failure-to-warn" or "negligent misrepresentation" claims — *Id.* at 131[1], the critical question for preemption purposes is whether the language relied upon in the advertisements "substantially differ[s]" from the language contained in the EPA-approved label:

> Thus, it is clear that there is a "FIFRA-created duty" to file "a statement of all claims" made for a pesticide with the EPA, § 136a(c)(1)(C), and not to make "any claims for it as a part of its distribution or sale" that

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1. This point is important insofar as the Kuipers argue that only "failure-to-warn" claims and not misrepresentation claims, are preempted by FIFRA. In *Lowe*, the 4th Circuit said the underlying claims could be characterized as either failure-to-warn *or* negligent misrepresentation claims, and was prepared to preempt *both* claims upon a showing that the statements contained in the advertising were not "substantially differ[ent]" from statements contained in the EPA-approved label. In any event, the Court does not think preemption should turn upon the name a plaintiff gives to his or her cause of action. If a statement in an advertisement is false, or contains a material omission, one could call it fraud, or one could call it a failure to warn. However one categorizes it, there is no principled reason for treating the claims differently for preemption purposes.

> "substantially differ from any claims made for it as a part of th[at] statement." § 136j(a)(1)(B). *Accordingly, the State of Maryland is not preempted from imposing common law liability on Sporicidin in the present case if Sporicidin's advertisements made "claims" "as a part of its distribution or sale" that "substantially differ" from "claims made for it as part of the statement required in connection with its registration."*

Id. at 130 (emphasis supplied) .

In *Taylor AG Industries v. Pure-Gro,* 54 F.3d 555 (9th Cir. 1995), the plaintiffs alleged that their cotton crops were damaged by the application of a mixture of two defoliants regulated by FIFRA (DROPP and DEF-6). The labels on each defoliant recommended their mixture, but specified different dosage rates. Plaintiffs alleged that when purchasing the defoliants from a local retailer, the retailer recommended the dosage rate contained in the label and Product Guide for the DROPP defoliant, which happened to specify a higher dosage rate than the DEF-6 defoliant. The plaintiff sued both the manufacturer and the retailer under a variety of theories, including failure-to-warn and breach of express and implied warranties. The district court granted summary judgment dismissing all of the claims, in part on preemption grounds. On appeal plaintiffs argued, *inter alia,* that although FIFRA preempted failure-to-warn claims based on the product labels, the manufacturers could still be held liable for failure-to-warn claims based upon their advertisements. The 9th Circuit, following the lead of the 11th Circuit in *Papas II,* rejected this distinction:

> Appellants next contend that liability should be imposed upon the Manufacturers for failure to warn

> arising from alleged deficiencies in advertisements, point-of-sale warnings, and other materials distributed in connection with a sale. The Eleventh Circuit squarely addressed this issue and dismissed a claim for inadequate point-of-sale signs because "any claims that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn the plaintiff necessarily challenge the adequacy of the warnings provided on the product's labeling or packaging. In accordance with the Eleventh Circuit, we hold that Appellants' claim for inadequate point-of-sale warnings is preempted because their claim is premised ultimately upon the inadequacy of the product label.

Id. at 561 (citations omitted). The *Taylor* case is also interesting insofar as it involved, as this case does, claims that the retailer made certain representations concerning the products at issue. Plaintiffs cited these representations as a basis for an express warranty claim against the retailer. The 9th Circuit first noted that FIFRA preemption applies equally to manufacturers and distributors. *Id.* at 562. The Court then held the express warranty claim preempted because there was no evidence that the "warranty" at issue varied at all from the language contained in the manufacturers' labels:

> Appellants allege that [the retailer] made an express warranty by directing them to the Product Guide for DROPP and DEF-6 mixing instructions. *There is no evidence that [the retailer] made any warranty that varied from the Manufacturers' labels and the Product Guide.* Thus, [the retailer's] liability for such an express warranty would be predicated upon a duty

> to provide information in addition to or different from that required by FIFRA. Imposing liability would circumvent the purposes of FIFRA by allowing states to require indirectly the dissemination of information that is outside the scope of the Manufacturers' labels.
>
> * * *
>
> We affirm the district court's ruling that Appellants' express warranty claim is preempted. *Appellants present no evidence establishing that [the retailer] made any statements that were inconsistent with or went beyond the labels of the Product Guide.*

Id. at 562-63 (emphasis supplied).

Finally, several other federal district courts, and at least two state supreme courts, have reached the same conclusion as the circuit courts in *Worm II, Papas II, Lowe*, and *Taylor,* holding that claims based on inadequacies or inaccuracies in a manufacturer's advertising or promotional materials are preempted by FIFRA where the language at issue is consistent with the language in EPA-approved labels or packaging. *See e.g., In re Dupont-Benlate Litigation,* 859 F. Supp. 619, 623-24 (D.P.R. 1994); *Cattell v. Great Lakes Chemical Corp.,* 1995 WL 250400 at *7-8 (D.N.J. 1995); *Sowers v. Johnson & Johnson Medical, Inc.,* 867 F. Supp. 306, 313 (E.D.Pa. 1994); *Pitts v. Dow Chemical Co.,* 859 F. Supp. 543, 549 (M.D.Ala.1994); *Goodwin v. Bacon,* 896 P.2d 673, 680-81 (Wash. 1995); *Jenkins v. Amchem Products, Inc.,* 886 P.2d 869, 881-82 (Kan. 1994).

Ultimately, in deciding the preemption issue on the facts of this case, the Court keeps in mind that questions concerning the extent to which FIFRA preempts state law causes of action are matters of federal law. *Jenkins,* 886 P.2d at 874-75. Thus, while the Court gives serious consideration to the views of the Wisconsin Supreme Court on such issues, it is not bound by that court's decision in *Gorton.* Moreover, the 7th Circuit has not yet addressed the precise preemption issue involved in this case. Accordingly, this Court is left to choose between the two conflicting lines of precedent detailed above, or to fashion its own alternative approach. After careful consideration, the Court agrees with the *Worm II* and *Papas II* line of cases. The Court reaches this conclusion for several reasons.

First, the *Gorton* decision primarily relies upon the U.S. Supreme Court's decision in the landmark preemption case, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). *Cipollone* dealt with the scope of the preemption provision contained in the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §§ 1331 -1340 ("PHCSA"). While holding that the PHCSA preempted several state law tort claims, the Supreme Court held that claims for fraudulent misrepresentation, similar to those raised here and in *Gorton,* could go forward. The PHCSA preemption provision precluded states from imposing any "requirement or prohibition *based on smoking and health* . . . with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." FIFRA's preemption provision is similar, though not identical, precluding states from imposing "any requirements for labeling or packaging in addition to or different from those required under this subchapter." While courts have held that the two provisions are identical in scope, at least for purposes of determining whether they both reach state *common*

law requirements, *see e.g., Shaw,* 994 F.2d at 371, there is one distinction in the language of the two statutes which the Court finds significant. That is, both statutes bar any state "requirements" concerning their respective subject matter, *i.e.*, "advertising or promotion" under the PHCSA and "labeling or packaging" under the FIFRA. However, the PHCSA adds an additional element, highlighted above: The state law "requirements" at issue must be "based on smoking and health". The *Cipollone* Court seized upon this latter language in finding that the fraud-in-advertising claims were not preempted by the PHCSA. The Court reasoned that such fraud claims were not predicated on a duty "based on smoking and health", but on a more general duty not to deceive, and therefore did not fall within the scope of the preemption provision. *Cipollone,* 505 U.S. at 528-29. FIFRA, however, does not state that the state law "requirements" at issue must be "based on" anything, much less a particular subject matter or objective. Rather, the statute clearly precludes "any requirements for labeling or packaging", making no distinction between requirements arising from a general duty not to deceive and requirements arising from a more specific duty based on "pesticides and health". Therefore, given the broader scope of the preemption language in FIFRA, *Gorton*'s reliance upon *Cipollone* in this regard seems misplaced.

Second, the reasoning of the *Worm II* and *Papas II* line of cases is more compelling. It strikes the Court as unduly mechanical to suggest that preemption turns upon *the source* of the representation at issue. In enacting FIFRA, Congress obviously intended, among other things, to make the content and accuracy of pesticide labels a matter for exclusive federal jurisdiction. Thus, if the EPA approves a given representation or claim for inclusion in a pesticide label, a state cannot create a cause of action challenging the accuracy of that representation

in the label. No one disputes this conclusion. Why, however, should the result be any different simply because the very same representation is made in an advertisement or other promotional material? Allowing such claims to go forward simply allows the states to accomplish indirectly what Congress tried to preclude them from doing directly. As suggested by *Lowe* and *Taylor,* a more sensible and practical approach focuses the preemption issue upon *the content and language* of the representation at issue. That is, if the advertisements at issue make representations that are substantially different from the representations made in the EPA-approved label or packaging, claims based on such representations will not be preempted by FIFRA.

Third, the facts of this case demonstrate how arbitrary the *Gorton* approach can be in certain situations. Here, while the Kuipers submitted several exhibits showing representations ACC made about SCEPTER in a number of non-label advertisements and promotional materials, there is no evidence in the record indicating that the Kuipers ever saw any of these materials before purchasing and applying SCEPTER in 1987. In fact, quite the opposite is true. The Kuipers admitted in their depositions that they never saw any advertisements relating to SCEPTER — other than the label — prior to their use of the product in 1987. Indeed, the only evidence of a non-label representation relied upon by the Kuipers in 1987 was Don Spangenberg's statement that it was safe to plant corn as a follow crop to a SCEPTER application[2]. This representation, of course, simply reiterates

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2. In light of these facts, ACC makes what initially appears to be a strong, alternative argument in favor of dismissal. That is, if the Kuipers never saw any of the advertisements or promotional materials prior to their purchase and use of SCEPTER, there clearly is no showing of reliance upon the representations contained therein (Cont'd)

the sum and substance of the representation found on the label and read by the Kuipers, *i.e.*, that it was safe to plant corn as a follow crop 11 months after a SCEPTER application. Under the Kuipers' view, however, the representation becomes actionable if, in addition to their reading of the label, the representation happens to be repeated orally by a retailer selling the merchandise. The Court finds this approach to preemption arbitrary and untenable. Accordingly, the Kuipers claims are preempted by FIFRA.

B. Statute of Limitations

Even if the Kuipers claims were not preempted, their statutory claim for fraudulent advertising under Wis. Stat. §100.18 is barred by the applicable statute of limitations. The statute of limitations for claims under this statute is three years and begins to accrue from "the occurrence of the unlawful act or practice which is the subject of the action." Wis. Stat. §100.18. The representation at issue here, *i.e.*, Spangenberg's 1987 statement that corn could be planted as a follow crop to a SCEPTER application, clearly occurred more than three years prior to the filing of this lawsuit. However, because a claim

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(Cont'd)
and/or no showing of causation. However, under Wisconsin law, it appears that a manufacturer can be liable on a theory of negligent misrepresentation if it provides written materials to a retailer, containing erroneous statements, and it is foreseeable that the retailer may pass those statements or materials on to the customer. *See e.g., D'Huyvetter v. A.O. Smith Harvestore Products,* 475 N.W.2d 587, 596-97 (Wis.Ct.App. 1991). Here, the Kuipers claim that Don Spangenberg told them that SCEPTER was safe for follow corn, and a reasonable inference can be drawn that Spangenberg obtained that information from SCEPTER's labeling or promotional materials.

under §100.18 is a fraud cause of action sounding in tort, Wisconsin's "discovery rule" applies. Under that rule, a cause of action does not accrue until "the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that he has been injured but also that his injury may have been caused by the defendant's conduct." *Borello v. U.S. Oil Co.*, 130 Wis. 2d 397, 410 (Wis.1986). Here, by their own admissions, the Kuipers were aware of an injury to their corn crops shortly after they were planted in 1988, and were informed by an ACC rep in 1989 that similar damage to their 1989 crop was likely due to SCEPTER carryover. Moreover, in December of 1989, and again in March of 1990, the Kuipers submitted a claim to ACC alleging that the injury to their 1988 corn crop was caused by SCEPTER carryover. Thus, more than three years prior to the filing of the complaint (April 30, 1993), the Kuipers were aware that they had been injured and that the injury may have been caused by ACC's conduct. The claim is therefore untimely.

The Kuipers argue, however, that they were not aware that ACC *knew* that SCEPTER posed a danger to follow crops at the time that it marketed SCEPTER until discovery in the *Gorton* suit uncovered internal ACC documents proving ACC's prior knowledge. This cannot be the import of the discovery rule. In December of 1989, the Kuipers knew that their corn crops had been injured and that the injury may have been caused by SCEPTER carryover. They also knew that ACC — through Spangenberg — had represented that no such carryover effect would occur. Thus, in December of 1989, the Kuipers knew that they may have been injured by SCEPTER carryover and that ACC may have misrepresented SCEPTER's safety to follow crops. To further require the discovery of internal documents essentially *proving* ACC's malfeasance before the statute of

limitations will begin to run guts the limitation of any meaning. Such a rule would, in most fraud cases, toll the statute of limitations indefinitely, as plaintiffs rarely obtain possession of the "smoking guns" referenced here by the Kuipers until a lawsuit is filed and discovery of the defendant's internal records becomes available.

NOW THEREFORE, BASED UPON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. Defendant's motions to dismiss and/or for summary judgment are granted and the case dismissed.

Dated at Milwaukee, Wisconsin, this 15th day of February, 1996.

SO ORDERED,

s/ Rudolph T. Randa
HON. RUDOLPH T. RANDA
U. S. District Judge

APPENDIX C — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN FILED FEBRUARY 24, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 93-C-566

CHARLES H. KUIPER, SR., et. al.,

Plaintiff(s),

-vs-

AMERICAN CYANAMID CO.,

Defendant(s).

DECISION AND ORDER

This matter comes before the Court on plaintiffs' motion for relief from judgment, motion to supplement the record, motion to extend the time for filing a notice of appeal, motion for supplemental order on appeal, and motion to expand the appellate record. The matter previously came before the Court on dispositive motions filed by the defendant, American Cyanamid Company ("ACC"). The Court granted those motions in a published decision and dismissed the case on grounds of federal preemption. *See, Kuiper v. American Cyanamid Co.*, 913 F. Supp. 1236 (E.D.Wis. 1996). In that decision, the Court made extensive findings of fact, familiarity with which is presumed, and which are incorporated here by this reference. *Kuiper*, 913 F. Supp. at 1237-38. The plaintiffs, Charles H.

Kuiper, Sr., Mae E. Kuiper and Charles A. Kuiper, Jr., all doing business as Charles H. Kuiper & Son Farms (collectively, "the Kuipers"), now ask the Court for relief from that judgment under Fed.R.Civ.P. 60(b)(6), based upon certain discovery materials obtained shortly before the Court issued the judgment. Specifically, the Kuipers submit deposition testimony of an ACC official implying that FIFRA does not contain labeling requirements for rotational crop restrictions and other testimony stating that the EPA does not develop product labels for manufacturers under FIFRA. The Kuipers also submit ACC advertising materials allegedly making claims about the SCEPTER product that are "substantially different" from the claims contained in the SCEPTER label. Further, the Kuipers argue that a subsequent decision from the United States Supreme Court substantially narrows the scope of federal preemption in this case. All of the foregoing, according to the Kuipers, merits relief from the prior judgment.

The Kuipers also ask the Court (1) to supplement the record in this case with the additional documents referenced above and with other transcripts and evidence related to the "causation" issue, (2) to extend the time for filing an appeal and issue a supplemental order on appeal, and (3) to expand the record for purposes of appeal. The Court addresses all of their requests below.

I

With regard to the motion for relief from judgment, the first question is whether the motion is properly brought under Rule 60(b)(6). Rule 60(b)(6) is a catch-all provision and provides for relief from a judgment or order for "any other reason justifying relief from the operation of the judgment."

While the Kuipers do not address how their motion fits within this category, it is clear that they seek relief from the judgment on three grounds: (1) recently-obtained evidence withheld by ACC shows that the Court was wrong in its legal conclusion that FIFRA contains labeling requirements for rotational crop restrictions; (2) recently obtained evidence withheld by ACC shows that ACC made representations in its advertising materials which were "substantially different" from the representations on the SCEPTER label; and (3) subsequent Supreme Court precedent has altered the law on federal preemption. The first two grounds, essentially based on the non-production of material evidence, can give rise to relief under Rule 60(b)(6). *See generally, Good Luck Nursing Home, Inc. v. Harris,* 636 F.2d 572 (Fed. Cir. 1980). The third ground, a change in Supreme Court precedent, cannot give rise to such relief, because "it is well settled that a change in decisional law is not grounds for relief under Rule 60(b)(6)." *Travelers Indemnity Co. v. Sarkisian,* 794 F.2d 754, 757 (2nd Cir. 1986), citing, *Ackermann v. United States,* 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950) and *Loucke v. United States,* 21 F.R.D. 305 (S.D.N.Y.1957). In any event, the Court will address the merits of each argument.

The Kuipers first argument was previously raised in opposition to ACC's motion for summary judgment. The Kuipers argue that FIFRA preemption does not apply to common law claims relating to rotational crop restrictions because neither FIFRA nor the regulations implementing the same contain labeling requirements regarding such restrictions. In support of this argument, they submit deposition testimony from Walter Congleton, a former ACC agriculturist and current member of ACC's management, opining that the rotational crop restriction contained in ACC's SCEPTER label "related to residue information and really has no applicability to the

performance of a subsequent crop planted after the use of the product." The Kuipers also submit testimony from Morton McDonald, Jr., a former ACC employee, stating that the EPA does not develop product labels for use by manufacturers but only reviews labels proposed by the manufacturers themselves. In this regard, the Kuipers reiterate that the EPA did not even request or consider follow crop studies in connection with its approval of the SCEPTER label.

Such "new" evidence does not alter the Court's conclusion on the preemption issue. Whether or not FIFRA and the regulations implementing the same contain labeling requirements for rotational crop restrictions is a question of law for the Court to decide, not a matter of opinion for current or former ACC employees. Moreover, the Kuipers' argument is similar to arguments rejected by other federal courts and which claimed that rotational crop restrictions are "voluntary" disclosures not mandated under FIFRA or the regulations. *See, Welchert v. American Cyanamid, Inc.*, 59 F.3d 69, 72-73 (8th Cir. 1995); *Worm v. American Cyanamid Co.*, 5 F.3d 744, 748-49 (4th Cir. 1993) ("*Worm II*"); both discussing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). Plaintiffs in those cases argued that, because such disclosures are voluntary, claims based thereon were more in the nature of "express warranty" claims, which the *Cipollone* Court held not to be preempted by federal statutory provisions precluding the issuance of different or additional state law "requirements". *Id.* The 8th and 4th Circuits disagreed, finding that rotational crop restrictions were expressly required under FIFRA's regulations:

> Finally, the Worms contend that American Cyanamid could voluntarily make additional disclosures and representations about Scepter and

> that it in fact did so when it modified its label to state that in drought conditions Scepter may have a greater carryover effect. They argue that American Cyanamid's failure to make a voluntary disclosure earlier and its breach of express warranties regarding Scepter's carryover effect fall in the range of voluntary conduct found not preempted by Cipollone. Relying on Cipollone, they argue that "a federally mandated warning does not preempt a state law remedy for breach of a contractual commitment that is voluntarily undertaken."[Citation omitted.]
>
> This argument, however, fails to recognize that American Cyanamid's inclusion on its label of the information that corn could be safely planted 11 months following application of Scepter was not voluntary. Such statements concerning rotational crop use are expressly required by the regulations adopted under FIFRA. See 40 C.F.R. section 156.1 0(i)(2)(x)(B).

Worm II, 5 F.3d at 748-49.

> We are faced with precisely the same issue. The express warranty claim of the Welcherts is based entirely on the label's statement with regard to the herbicide's carryover effect. . . . As noted in Worm, federal regulation requires a pesticide manufacturer to provide labeling information about rotational crop restrictions. [Citation omitted.] Cyanamid's label statement on rotational crop use is thus a mandated disclosure, not a "voluntarily undertaken" promise.

> [Citation omitted.] The determination that the challenged label statement was required by federal law was essential to the Worm court's decision on the preemption of the express warranty claim.

Welchert, 59 F.3d at 72. Indeed, the regulation relied upon in *Welchert* and *Worm II* expressly requires that information regarding rotational crop use be included in the pesticide label:

> *(2) Contents of Directions for Use.* The directions for use shall include the following, under the headings "Directions for Use":
>
> * * *
>
> (x) Any limitations or restrictions on use required to prevent unreasonable adverse effects, such as:
>
> * * *
>
> (B) Rotational crop restrictions.

40 C. F. R. Section 156.10(i)(2)(x)(B).

Thus, the Kuipers' argument that FIFRA does not preempt common law claims relating to rotational crop restrictions because such disclosures are not required by the FIFRA regulations is incorrect. Further, the claim that the EPA may not require or review rotational crop studies before approving pesticide labels, even if true, would not alter the Court's conclusion. Such a claim essentially challenges the EPA's approval process and seeks to have the Court, through the vehicle of a state law claim, collaterally review the factual basis

for, and accuracy of, an EPA-approved label. This the Court cannot do:

> To hold otherwise would be to allow state courts to sit, in effect, as super-EPA review boards that could question the adequacy of the EPA's determination of whether a pesticide registrant successfully complied with the specific labeling requirements of its own regulations. In such case, state court consideration of the label statement would be an "additional" requirement.

Welchert, 59 F.3d at 73; *see also, Lewis v. American Cyanamid Company*, 294 N.J.Super. 53, 68, 682 A.2d 724, 732 (App. 1996)("To permit a plaintiff to litigate that cause of action would require a state court to determine the factual basis for the determination made by the EPA and, if that factual basis was erroneous, to decide what the true facts are and how they would affect the EPA's approval of the defendant manufacturer's label.").

The Kuipers' second argument addresses the Court's prior conclusion that, as for their claims based on the content of SCEPTER advertising, the critical question for preemption purposes is whether the language relied upon in the advertisements "substantially differ[s]" from the language contained in the EPA-approved label. The Kuipers argue that additional discovery received just prior to the Court's summary judgment decision reveals further evidence that ACC made additional representations in their advertising materials which were "substantially different" from the claim on SCEPTER's label, *i.e.*, that it is safe to plant follow corn 11 months after a SCEPTER application. Such evidence is not new to this case,

however. The Kuipers previously submitted advertising materials making the same or similar types of claims. As the Court previously pointed out, the problem with relying upon these materials is that the Kuipers never saw any of the materials before buying and using SCEPTER:

> Here, while the Kuipers submitted several exhibits showing representations ACC made about SCEPTER in a number of non-label advertisements and promotional materials, there is no evidence in the record indicating that the Kuipers ever saw any of these materials before purchasing and applying SCEPTER in 1987. In fact, quite the opposite is true. The Kuipers admitted in their depositions that they never saw any advertisements relating to SCEPTER — other than the label — prior to their use of the product in 1987. Indeed, the only evidence of a non-label representation relied upon by the Kuipers in 1987 was Don Spangenberg's statement that it was safe to plant corn as a follow crop to a SCEPTER application. This representation, of course, simply reiterates the sum and substance of the representation found on the label and read by the Kuipers, *i.e.*, that it was safe to plant corn as a follow crop 11 months after a SCEPTER application.

Kuiper, 913 F. Supp. at 1244-45. Thus, because Spangenberg's oral statement about SCEPTER's safety vis-a-vis follow corn was not "substantially different" from the rotational crop restriction contained on SCEPTER's EPA-approved label, the Court held that any claims based on that oral statement were preempted. While the Kuipers are generally correct that FIFRA

would not preempt claims based on statements contained in SCEPTER advertising that are "substantially different" from the statements contained in the SCEPTER label, the same presumes that the Kuipers actually read and relied upon the "substantially different" statements in buying or using SCEPTER. If they did not, as is undisputed here, they cannot use such statements to escape FIFRA preemption.[1]

Finally, the Kuipers cite the U.S. Supreme Court's recent decision in *Medtronic, Inc. v. Lohr*, __ U.S. __, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) as having "significantly narrowed the

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1. In fact, as the Court noted in its initial decision, such statements are relevant only as a basis for making ACC liable for Spangenberg's misrepresentations. That is, in addition to the preemption argument (a wholly separate basis for dismissal), the Kuipers faced a causation problem, *i.e.*, they never saw any of the underlying advertising materials. At most Spangenberg made a single statement about the product, but Spangenberg was not an ACC agent or employee. How could ACC be held liable for Spangenberg's misrepresentation? As an aside, the Court noted in its prior decision that there was precedent in Wisconsin for holding a manufacturer liable for negligent misrepresentation if it provides written materials to a retailer containing erroneous statements, and it is foreseeable that the retailer may pass those statements or materials on to the customer. *Kuiper*, 913 F. Supp. at 1241, fn. 2, citing *D'Huyvetter v. A.O. Smith Harvestore Products*, 164 Wis.2d 306, 475 N.W.2d 587, 596-97 (App. 1991). In stating this, the Court was simply noting that ACC could be held liable for Spangenberg's misrepresentations, but only insofar as those misrepresentations stemmed from his reading of ACC marketing materials, *and only insofar as they were "substantially different" from statements contained on SCEPTER's EPA-approved label.* Here, Spangenberg simply reiterated information already contained on the label. Any claims based on that statement were preempted, so the Court never had to reach the causation issue.

scope of federal preemption". The Court disagrees. *Medtronic* concerned interpretation of the preemptive effect of the Medical Device Amendments of 1976 ("MDA"). The MDA is a federal statute which first classifies medical devices into three categories according to the risk they pose to the public. Based on those classifications, the statute then submits those devices to varying degrees of regulation, including a pre-market approval process and manufacturing and labeling requirements. The MDA also contains an express preemption provision, as well as implementing regulations interpreting the scope of that provision. Because of the language of the statute, language quite different from that at issue here, and because of the regulation interpreting the preemption provision, the Supreme Court gave a narrow interpretation to the statute and held that a variety of state common law claims, including claims for failure to warn, were not preempted.

The Kuipers argue that *Medtronic* "substantially reduced" the scope of preemption by holding that "[p]reemption occurs only where a particular state requirement threatens to interfere with a specific federal interest." The Kuipers claim that, as a result of *Medtronic*, "general federal regulations will not preempt state requirements." What the Kuipers fail to point out, however, is that the language they rely upon in *Medtronic* arose from an interpretation of the unique language of the MDA and its implementing regulations. It was not part of a general discussion on the law of preemption, nor did it purport to set forth a general rule governing all future preemption cases. Rather, the Court noted that the MDA "expressly states that a federal requirement must be *'applicable to the device'* in question before it has any preemptive effect." *Medtronic*, 116 S.Ct. at 2256 (emphasis supplied). Further, the Court noted that the federal regulation concerning MDA preemption stated that "a state requirement is

not preempted unless the FDA has established 'specific requirements applicable to a particular device.' " *Id.* at 2249, 2256-57. Based on such language, the Court held that the MDA "mandates pre-emption only where there is a conflict between a specific state requirement and a federal requirement 'applicable to' the same device." *Id.* The Court stated that, "[a]lthough we do not believe that *this statutory and regulatory language* necessarily precludes 'general' federal requirements from every pre-empting state requirements, . . . it is impossible to ignore *its* overarching concern that pre-emption occur only where a particular state requirement threatens to interfere with a specific federal interest." *Id.* at 2257. Thus, the conclusion reached by the Court was entirely dependent on the "statutory and regulatory language" at issue. That language is quite different from the language used in FIFRA. FIFRA does not restrict its preemptive effect to a conflict between state and federal requirements applicable to a "specific" pesticide. Rather, FIFRA expressly preempts "any requirements for labeling or packaging", not "any requirements for labeling or packaging *of a pesticide*".[2] Moreover, FIFRA does not have a corresponding federal regulation which limits its preemptive

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2. Even if the statute was written in this way, and thus paralleled the MDA, the Court is not convinced that such language merits a different result. The Court tends to agree with Justice O'Connor's dissent in *Medtronic*, which argued that the statutory phrase "applicable to a device" means only what it says, *i.e.*, that the federal or state requirement must generally apply to the device at issue, not that it must apply *only* to the *specific* device at issue. *Id.* at 2263-64 (O'Connor, J., dissenting-in-part). Justice O'Connor concluded that, because the statute did not support the "specificity" requirement, the majority could only find such a requirement in the regulations, which Justice O'Connor believed to be an inappropriate basis for narrowing the scope of an otherwise unambiguous statutory provision. *Id.*

effect to those cases where a state requirement conflicts with a "specific requirement[] applicable to a particular device". Such a regulation, along with the MDA's particular statutory language, was critical to the Court's opinion in *Medtronic.*

One also has to consider the position which the Supreme Court rejected in *Medtronic.* The manufacturer in that case was arguing that the MDA's preemption of different or additional state law "requirements" for medical devices preempted *all* state common law damages claims. *Id.* at 2251. There was no precedent for such a position. While the Supreme Court's *Cipollone* decision did state that the word "requirements" includes state common law claims, the statutory language involved there further limited the preemptive scope to state common law claims "based on smoking and health" and involving the "advertising or promotion of cigarettes. . . ." Thus, in the words of the *Medtronic* Court, "giving the term 'requirement' its widest reasonable meaning did not have nearly the pre-emptive scope nor the effect on potential remedies that Medtronic's broad reading of the term would have in this case. The Court in *Cipollone* held that the petitioner in that case was able to maintain some common-law actions using theories of the case that did not run afoul of the preemption statute." *Id.* at 2251-52. Similarly, the Court's decision in this case noted that FIFRA does not preempt all state common law claims. The statute limits preemption to state common law claims effecting "any requirements for labeling or packaging". It would not preempt claims for negligence or strict liability in the manufacture of pesticides. Nor would it preempt claims for negligent misrepresentation, so long as the representations at issue were substantially different from any information required to be placed on the pesticide label. Thus, the scope of FIFRA preemption is much narrower than that rejected in *Medtronic*

and more analogous to what the Supreme Court upheld in *Cipollone*. *Medtronic* simply does not alter the Court's conclusion in this case.

II

The Kuipers also ask the Court to supplement the record to include the additional items obtained through discovery which they rely upon here, plus additional deposition transcripts and other evidence on the causation issue. As for the additional evidence obtained just prior to the Court's decision, none of it alters the Court's conclusion on summary judgment. Moreover, such evidence is submitted as a basis for granting relief from the prior judgment. As explained in sections III and IV, *infra*, such evidence is properly a part of the record on appeal from *the current* decision. It should not be included in the record of the Court's *summary judgment* decision. As for the causation issue, the Court has already explained that it did not have to reach that issue, either in this decision or the summary judgment decision. As such, the Court sees little reason to include it in the record.[3]

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3. Curiously, the additional evidence on causation which the Kuipers seek to add seems to hurt their case rather than help it. As the Court stated earlier, the Kuipers face a causation problem because they never saw any of the advertisements containing the misrepresentations which they now rely upon to defeat preemption. The Court noted that they could get around this problem if they could show that Spangenberg was provided with the advertisements at issue and he communicated the substance of those advertisements to the Kuipers. But we already know that the only thing Spangenberg told the Kuipers was that SCEPTER was safe for follow corn. This, of course, is not enough to defeat preemption because the statement simply reiterates information contained in the SCEPTER label. However, we now learn that there is little evidence, if any, that

(Cont'd)

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III

The Kuipers next request involves a matter of appellate procedure. Initially, rather than file a notice of appeal, the Kuipers filed the current motion for relief from judgment under Rule 60(b)(6). Under Fed.R.App.P. 4(a)(4)(F), such a motion tolls the running of the appeal period if it is filed "no later than 10 days after the entry of judgment." Judgment was entered in this case on February 15, 1996. The Kuipers' motion was not filed until March 8, 1996. Therefore, the motion did not toll the running of the appeal period. Realizing that the appeal period would expire before the Court addressed their Rule 60 motion, on March 13, 1996 the Kuipers filed a timely motion to extend the time for filing the notice of appeal, along with an actual notice of appeal. The latter was filed to preserve the Kuipers' appeal rights because their underlying motion for an extension could not be heard before the appeal period expired. The appeal is apparently still pending, although the 7th Circuit suspended any briefing on the matter until this Court decides the Rule 60 motion.

Despite the pending appeal, the Kuipers ask the Court to extend the time for filing an appeal, and the question becomes whether such an extension is even necessary to preserve their appeal rights. The Court thinks not. Had the motion for relief

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(Cont'd)
Spangenberg himself saw any information from ACC other than that contained in the SCEPTER label. Spangenberg testified that the only thing he received at an ACC program regarding the SCEPTER product was a label. (Spangenberg Dep. at 22-23.) While it is possible, perhaps even likely, that the company he worked for received additional promotional materials, Spangenberg has no specific recollection of the same and no recollection of having personally reviewed the same. (Id. at 32-34.)

been filed within 10 days of entry of judgment, it would have tolled the appeal period and the subsequent notice of appeal would have been rendered ineffective. Fed.R.App.P. 4(a)(4). As such, the 7th Circuit would not have jurisdiction over the matter and the appeal would have to be dismissed. *See, Square D Company v. Fastrak Softworks, Inc., 1997* WL 54573 (7th Cir. 1997). In other words, a timely Rule 59 or Rule 60 motion renders an underlying judgment "non-final", thereby destroying the basis for an appeal. *Kunik v. Racine County,* 1997 WL 41005, *4 (7th Cir. 1997). However, other motions, "such as [the Kuipers'] Rule 60(b) motion[] filed more than 10 days after judgment, do not affect the finality of a district court's judgment, either when filed before the appeal (no tolling), or afterwards (appellate court jurisdiction not divested)." *Id.* Moreover, "[m]otions that do toll the time for taking appeal give rise to only one appeal in which all matters are reviewed; motions that do not toll the time for taking an appeal give rise to two separate appellate proceedings that can be consolidated." *Id.* Thus, based on the foregoing, the Kuipers' first notice of appeal was sufficient to initiate and preserve their right to appeal the Court's summary judgment decision. There is no need to extend the time for filing a notice to appeal that decision; the appeal is already commenced. As for the Kuipers' right to appeal the current decision, they must initiate a separate appeal through a second notice of appeal filed within thirty days after the date of this order. The 7th Circuit may consolidate that appeal with the first appeal, but that is not a matter for this Court to decide.[4]

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4. The foregoing renders moot the Kuipers' request for a supplemental order on appeal.

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IV

Finally, the Kuipers ask the Court to expand the record on appeal. The request relates to the appeal which they have already commenced. The Court received no objection from ACC to this request. However, two of the items sought to be included — items 42 and 43 — were letters submitted in connection with the Rule 60 motion arguing the impact of the Supreme court's *Medtronic* decision. As such, they form part of the record for the second appeal the Kuipers must file, and thus will not be included in the record of the first appeal. The remaining items 48, 49, 54, 58, 65 and 66 relate to the first appeal and shall be included in the record of that appeal.

NOW THEREFORE, BASED UPON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. The Kuipers' motion for relief from judgment is denied;

2. The Kuipers' motion to supplement the record is denied;

3. The Kuipers' motion to extend the time for filing an appeal is denied;

4. The Kuipers' motion for a supplemental order on appeal is denied as moot; and

5. The Kuiper's motion to expand the appellate record is denied-in-part and granted-in-part.

Dated at Milwaukee, Wisconsin, this 24th day of February, 1997.

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SO ORDERED,

s/ Rudolph T. Randa
RUDOLPH T. RANDA
U.S. District Judge

APPENDIX D — OPINION OF THE SUPREME COURT OF THE STATE OF WISCONSIN IN *GORTON V. AMERICAN CYANAMID COMPANY* DECIDED JUNE 26, 1995

John L. GORTON, Thomas Hauch, Timothy Hauch and Michael Vander Leest, partners under the name Gorton Farms, a Wisconsin general partnership,

Plaintiffs-Respondents,

v.

AMERICAN CYANAMID COMPANY, a Maine corporation,

Defendant-Appellant

Supreme Court

Nos. 93-0778, 93-2267. Oral argument April 4, 1995. — Decided June 26, 1995

(On certification from the court of appeals.)

(Also reported in 533 N.W.2d 746.)

* * *

APPEAL from an order of the circuit court for Racine County, Dennis J. Barry. *Affirmed.*

For the defendant-appellant there were briefs by *Kenneth B. Ness, John M. Filachek* and *Ness & Foley,* Milwaukee and *Lawrence S. Ebner* and *McKenna & Cuneo,* Washington, D.C. and oral argument by *Kenneth B. Nass* and *Lawrence S. Ebner.*

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For the plaintiffs-respondents there was a brief by *Robert H. Bichler, JoAnne M. Breese-Jaeck* and *Hostak, Henzl & Bichler, S.C.*, Racine and oral argument by *Robert H. Bichler.*

WILCOX, J. This case is on certification from the court of appeals following a jury trial held in the circuit court for Racine County, Honorable Dennis J. Barry, Judge. The jury concluded that Gorton Farms Inc. was entitled to damages for harm to its corn crops caused through the negligence of American Cyanamid Company (American Cyanamid). The issue certified for our consideration is as follows:

> Whether, in light of *Cipollone v. Liggett Group, Inc.*, 505 U.S. __, 112 S. Ct 2608 (1992), the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. sec. 136v(b), preempts Wisconsin common law damage claims of breach of warranty, failure to warn and misrepresentation brought against a chemical manufacturer of a herbicide registered with the Environmental Protection Agency (EPA)?

In resolving this issue we also consider a separate issue of whether attorney fees granted to Gorton Farms by the circuit court pursuant to sec. 100.18, STATS., were appropriate. We concluded that the circuit court properly determined that Gorton Farms' claim as to negligent misrepresentation is not preempted by FIFRA and that Gorton Farms is entitled to attorney fees pursuant to sec. 100.18. Therefore, we affirm the decision of the circuit court.

During the 1980's, American Cyanamid developed an herbicide known as SCEPTER.[1] The herbicide is designed to

1. Herbicides fall within FIFRA's definition of "pesticide" and, (Cont'd)

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control weeds in soybean crops. SCEPTER was first sold for use in Wisconsin in 1987. SCEPTER has been marketed through American Cyanamid sales personnel and technical representatives, and is sold by agricultural dealers chosen by American Cyanamid.

In May of 1987 and 1988, Gorton Farms bought SCEPTER for their soybean fields. Gorton Farms purchased SCEPTER from the Delong Company, an authorized American Cyanamid agricultural dealer. SCEPTER was preplant incorporated on several fields by Gorton Farms in both 1987 and 1988. There is no dispute that the herbicide provided excellent weed control for the soybean plants.

In the spring of 1988, Gorton Farms planted field corn as a follow crop to the soybeans. Thus, the corn was planted into fields that had eleven months earlier been sprayed with SCEPTER. In June, 1988, there was evidence that the field corn was not growing properly. Gorton Farms asked Ronald Doersch of the University of Wisconsin Agronomy Department to examine the fields. Doersch indicated that the corn could have been adversely affected by the previous application of SCEPTER.

On February 9, 1990, Gorton Farms filed a complaint against American Cyanamid alleging theories of breach of warranty, defective product based on failure to provide adequate instructions for use, and negligent misrepresentation concerning SCEPTER's use in follow corn crops. In September, Gorton

(Cont'd)
therefore, are within the purview of the federal statute. See 7 U.S.C. sec. 136(u) (1988). Accordingly, any reference to pesticide in this opinion will necessarily include an herbicide such as SCEPTER.

Farms amended its complaint to allege outrageous conduct in that American Cyanamid misrepresented SCEPTER as safe for "follow corn" despite having evidence of adverse carryover to corn from its field tests.

In November, 1991, American Cyanamid filed a "Motion For An Order Limiting Damages." American Cyanamid argued that: (1) SCEPTER's label contained enforceable disclaimers and limitations on liability; and (2) FIFRA expressly prohibits states from imposing additional or different labeling requirements and, therefore, preempts state common law tort claims based on a failure to adequately warn. The circuit court ruled that the disclaimers did not limit American Cyanamid's liability and FIFRA did not preempt Gorton Farms' state common law tort claims. The court stated: "It is this Court's opinion that the defendant has failed to demonstrate the clear purpose of Congress to have FIFRA supersede the police powers of the state of Wisconsin in this matter. Therefore, that portion of the defendant's motion to limit damages which is based on the doctrine of federal preemption is denied."

The cased subsequently proceeded to a jury trial beginning in August, 1992. Following several weeks of trial, the jury was given a number of instructions as to negligence and strict liability. The jury found that American Cyanamid was "negligent regarding SCEPTER," that SCEPTER was not unreasonably dangerous to Gorton Farms' follow corn crops, that Gorton Farms was not negligent, and that American Cyanamid's conduct was outrageous. The jury awarded Gorton Farms compensatory damages in the sum of $129,300.00 and punitive damages in the sum of $50,000.00. Judgment on the verdict was entered on February 4, 1993. American Cyanamid filed a notice of Appeal on March 22, 1993.

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On March 4, 1993, Gorton Farms filed a motion in the circuit court requesting an award of attorney fees pursuant to sec. 100.18(11)(b)2, STATS. Following briefing and several oral hearings on the matter, the circuit court concluded that an award of attorney fees was appropriate and granted fees in the sum of $307,421.25. An amended judgment was entered on July 30, 1993. A Notice of Appeal from the amended judgment was filed on August 18, 1993. The court of appeals granted a motion by American Cyanamid to consolidate the two appeals. Following briefing to the court of appeals, that court certified the above question to this court. We accepted jurisdiction of the entire matter on September 20, 1994. Further facts necessary for a resolution of the case are set forth below.

I. Preemption under FIFRA

The threshold issue on review is whether the circuit court properly concluded that FIFRA does not preempt Gorton Farms' state common law tort claims. American Cyanamid asserts that all of Gorton Farms' claims are predicated on a theory of failure to warn and, as such, are preempted by sec. 136v(b) of FIFRA. Gorton Farms responds that "FIFRA does not preempt common law damage liability based on negligent and outrageous conduct and testing and in misrepresenting SCEPTER's safety to follow corn, which conduct was part of [American Cyanamid's] marketing and sales activity and not based on SCEPTER's labeling or packaging."[2]

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2. As an initial matter, we note that the record in this case does not contain a complete transcript of the trial evidence and proceedings. "When [an appellate] court does not receive a complete transcript, we assume that any fact necessary to sustain the trial judge's exercise of discretion is supported by the record." *Haack v. Haack,* 149Wis. 2d 243, 247, 440 N.W.2d 794, 796 (1989) (citing *D.L. v. Huebner,* 110 Wis. 2d 581, 597, 329 N.W.2d 890,
(Cont'd)

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Federal preemption of state law implicates issues of governmental authority that go to the very heart of our federal system. The potential for conflict between federal enactments and state law is a persistent reminder of the tensions inherent in our governmental structure. Although the federal Constitution envisions a substantial role for state governments, it also commands that federal law "shall be the supreme law of the land." U.S. CONST. art. VI, cl.2.[3] Further, while states are treasured for their roles as "laborator[ies] . . . [to] try novel social and economic experiments," *see New York State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932), there is also the recognition of the importance of national control and uniformity.

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897 (1983)); *see also Suburban State Bank v. Squires*, 145 Wis. 2d 445, 451, 427 N.W.2d 393, 396 (1988). Moreover, this court has explained that the scope of review is necessarily confined to the record before the court when an appeal is brought on a partial transcript. *Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 641, 273 N.W.2d 233, 239 (1979). Even absent a complete transcript, however, this court can consider errors of law in circuit court memoranda.

3. The complete text of the Supremacy Clause of the Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

U.S. CONST. art. VI, cl.2

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Recently, preemption principles have been the center of many hard-fought legal battles involving important societal issues. Examples of these disputes range from challenges as to the validity of state statutes designed to limit corporate takeovers, *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), to challenges as to whether a state statute requiring payment of surcharges based on the status of the underlying insurance provider is preempted by ERISA, *New York Conference of Blue Cross Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671 (1995). An interesting example of the controversy surrounding the use of federal preemption is an executive order promulgated by former President Ronald Reagan in 1987 designed to dissuade executive departments and agencies from interpreting federal statutes in ways that would displace state law.[4]

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4. *See* Exec. Order No. 12,612 (1987), reprinted in 5 U.S.C. sec. 601 app. 478 (1988). In pertinent part, the Order states:

> (a) To the extent permitted by law, Executive departments and agencies shall construe, in regulations and otherwise, A Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute.
>
> (b) Where a Federal statute does not preempt State law, Executive departments and agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rule-making only when the statute expressly authorizes issuance of preemptive regulations or there is some other firm and palpable evidence compelling the conclusion that the Congress intended to delegate to the department or agency the authority to issue regulations preempting State law.

(Cont'd)

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When considering the federal preemption doctrine an important benchmark is a definition of both federal and state law. Obviously, federal law includes the United States Constitution and all of the federal statutes and treaties promulgated by Congress. Federal law also includes federal regulations promulgated by the various federal agencies. In *Fidelity Federal Savings and Loan Assoc. v. De La Cuesta*, 458 U.S. 141, 153 (1982), the Supreme Court stated that "federal regulations have no less pre-emptive [sic] effect than federal statutes." Thus, federal law is broadly defined and includes regulations made by federal agencies under their congressionally granted authority.

On the state side, it is apparent that state constitutions, state statutes, and state regulations will all be encompassed within the definition of "state law." Also falling within the heading of state law, and of great important to the issue at hand, is the concept of state common law tort actions. As noted by one commentator, "[t]he regulatory effect of tort law has long been recognized." Penning Parker Landen, *Federal Preemption and the Drug Industry: Can Courts Co-Regulate?*, 43 Food Drug

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> (c) Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.
>
> (d) As soon as an Executive department or agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the department or agency shall consult, to the extent practicable, with appropriate officials and organizations representing the States in an effort to avoid such a conflict.

Cosm. L.J. 85, 86 (1988). Further, In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959), the Supreme Court stated that "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing and controlling policy." Accordingly, the court held that federal preemption of state action may occur where that action seeks "to redress private wrongs or grant compensation for past harm." *Id.*

Federal presumption may occur under several different scenarios. Express preemption occurs where Congress has seen fit to speak directly to the preemptive effect of a particular statute. The major question in cases arising under this scenario is the scope of the express preemption provision.[5] The more typical preemption case involves a statute that is either silent, or at least ambiguous, with respect to its preemptive effect. Where a statute is silent or ambiguous, courts generally have required clear evidence of legislative intent to preempt state law. For example,

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5. A frequently cited case for this type of preemption is *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). In *Jones*, the Court considered a conflict between the California Business and Professions Code and the Federal Meat Inspection Act (FMIA) on measuring certain packaged meats. The state statute in question required that every package of bacon, at the time of the sale, weigh an amount equal to or greater than the weight stated on the package. The state law allowed for variations caused by the manufacturing process, but did not allow for deviations from stated weights due to moisture loss during distribution. FMIA, on the other hand, allowed for reasonable variations due to moisture loss. More importantly, the federal act contained a provision prohibiting the imposition of "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under" FIMA. *Id.* at 530. The Court found this language to present a clear expression of legislative intent and concluded that the state law was preempted. *Id.* at 530–31.

in *Hillsborough County, Fla., v. Automated Medical La., Inc.*, 471 U.S. 707, 715 (1985), the Court noted that there is a basic "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Courts have, however, on occasion determined that a congressional enactment impliedly preempts state law. This implied preemption is most often separated into three categories: occupation of the field preemption, obstacle preemption, and administrative preemption. *See* Jose L. Fernandez, *Dynamic Statutory Interpretation: Occupational Safety and Health Act Preemption and State Environmental Regulation*, 22 FLA ST. U.L. REV. 75, 81–86 (1994).

Turning to the statute at hand, FIFRA was originally enacted in 1947 as a pesticide licensing and labeling statute and "was designed to work in harmony with the uniform state insecticide, fungicide and rodenticide act which was adopted in many States." S. REP. NO. 838, 92nd Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 3999. In 1972, the Act was amended such that FIFRA was transformed from a labeling law into a comprehensive regulatory statute. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). As noted by the Supreme Court: "As amended, FIFRA regulated the use, as well as the sale and labeling, of pesticides; regulated pesticides produced and sold in both intrastate and interstate commerce; provided for review, cancellation, and suspension of registration; and gave EPA greater enforcement authority." *Id.* at 991–92.

Within FIFRA, Congress provided a detailed scheme for regulating the content of a pesticide's label. All pesticides sold in the United States must be registered for use by the EPA. 7 U.S.C. sec. 136a(a). The EPA has promulgated specific

labeling requirements governing the scope, content, wording, and format of pesticide labeling. *See* 40 C.F.R. sec. 156 (1992). While the manufacturer designs and formulates the content of the label, it must file with the EPA a statement which includes "the name of the pesticide," "a complete copy of the labeling of the pesticide, a statement of all claims to be made for it, and any directions for its use;" and a full description of the tests made and the results thereof upon which the claims are based. 7 U.S.C. sec. 136a(c)(1)(B)–(D).[6]

FIFRA also contains a section relating to state's rights in relation to the statute. Section 136v of FIFRA, titled "Authority of States," provides:

> (a) In General
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this Act.
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labelling or packaging in addition to or different from those required under this Act.

A plain reading of this provision reveals sec. 136v(a) expressly prohibits a state from permitting a sale or use of a pesticide that is prohibited by FIFRA, and sec. 136v(b) expressly prohibits any state labeling requirement "in addition to or different from"

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6. There is no dispute that at all times pertinent to this suit, SCEPTER was registered and labeled pursuant to FIFRA's requirements.

that imposed by FIFRA. However, in considering whether congress intended to occupy the *entire* field of pesticide regulation through sec. 136v, we find no language to that effect, nor does the legislative history of the statute suggest it. *See Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597, 609-10 n.4 (1991). As noted by the Supreme Court:

> While the 1972 amendments turned FIFRA into a "comprehensive regulatory statute," the resulting scheme was not "so pervasive as to make reasonable the inference that congress left no room for the States to supplement it." To the contrary, the statute leaves ample room for States and localities to supplement federal efforts even absent the express regulatory authorization of sec. 136v(a) .... FIFRA ... leaves substantial portions of the field vacant ....

Id. at 613 (citations omitted).

For more guidance on the preemption issue, both parties direct this court to *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992). *Cipollone* involved similar preemption provisions relating to the federal statutes governing cigarette labeling and advertising. *Id.* at 2616–17. The Court concluded that sec. 5(b) of the Public Health Cigarette Smoking Act of 1969 preempted the plaintiff's state law tort claims based on the defendant's failure to warn of the hazards of cigarette smoking. *Id.* at 2621.[7]

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7. Section 5 of the 1969 Act, captioned "Preemption," provides:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

15 U.S.C. sec. 1334(b)

The Court cautioned, however, that sec. 5 did not preempt all common law. For example, the Court stated that although the statute preempted state labeling requirements, it did not preempt state law obligations to avoid marketing a product with a manufacturing defect or with a design defect. *Id.* The court then set forth its test to determine whether preemption was appropriate for plaintiff's common law claims:

> [W]e must fairly but — in light of the strong presumption against pre-emption — narrowly construe the precise language of sec. 5(b) and we must look to each of petitioner's common law claims to determine whether it is in fact pre-empted. The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common law damages action constitutes a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion," giving that clause a fair but narrow reading.

Id. Thus, the teaching of *Cipollone* is that courts must compare the particular language of a statute's preemption provision with each common law claim asserted to determine whether the common law claim is in fact preempted. Further, only if "the legal duty that is the predicate of the common law damages action constitutes" a requirement for labeling or packaging that is in addition to or different from those required by FIFRA will the asserted claims be preempted.

In the present case, Gorton Farms brought claims based on defective product, breach of warranty, and negligent misrepresentation. There is no dispute that each claim is a viable

action under Wisconsin state law. American Cyanamid, however, asserts that each of these claims is derivative to the labeling and packaging of SCEPTER and, therefore, should be preempted by FIFRA. Gorton Farms counters that its proof at trial never touched on or attacked SCEPTER's labeling or packaging; rather, it centered on American Cyanamid's field tests, lack of scientific testing, and false and misleading statements in the promotion of SCEPTER.

In its amended complaint, under the heading of "CLAIM II," Gorton Farms alleges the following:

> 13. SCEPTER as labeled for use in Wisconsin is a defective product since its application interferes with the normal crop rotation and causes a loss in crop yield.
>
> 14. American Cyanamid Company failed to adequately warn Gorton Farms of the dangerous nature of the product and provided defective instructions for use.
>
> 15. As a result of American Cyanamid Company's manufacture and sale of this defective product and its defective warnings and instructions in use Gorton Farms suffered pecuniary losses in its corn yield in 1988 and 1989.

These allegations provide two distinct claims: (1) strict liability — defective design or manufacture, and (2) strict liability — failure to warn.[8] In the special verdict, the jury was simply asked

8. We note that those courts that have considered the issue have (Cont'd)

whether SCEPTER was unreasonably dangerous to Gorton Farms' follow corn crops. The jury answered the question "No." Gorton Farms did not cross-appeal from this finding, and, therefore, the issue of preemption of Gorton Farms' strict liability claim under FIFRA is not properly before this court.

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found the distinction in claims to be critical: (1) claims of strict liability based on design or manufacture defect are not preempted by FIFRA, *see Cipollone*, 112 S. Ct. at 2621 (noting that similar preemptive provision of Public Health Cigarette Smoking Act of 1969 does not preempt claims based on manufacturing defects); *Worm v. American Cyanamid Co.*, 5 F.3d 744, 747 (4th Cir. 1993) (claims relating to testing, manufacturing, and formulating are not preempted); *Helms v. Sporicidin International*, 871 F. Supp. 837, 843 (E.D.N.C. 1994) (claims based on defect in product are not preempted); *Higgins v. Monsanto*, 862 F. Supp. 751, 759 (N.D.N.Y. 1994) (claims of strict liability based on design defect survive FIFRA preemption); *Jillson v. Vermont Log Buildings, Inc.*, 857 F. Supp. 985, 991 (D. Mass. 1994) (claims regarding design and manufacture are not preempted by FIFRA); *Kennan v. Dow Chemical Co.*, 717 F. Supp. 799, 804–05 (M.D. Fla. 1989); *Fisher v. Chevron Chemical Co.*, 716 F. Supp. 1283, 1288 (W.D. Mo. 1989); whereas (2) claims of strict liability based on inadequate labeling are preempted by FIFRA, *see Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993) (strict liability claim based on failure to warn against combining regulated products preempted by FIFRA); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993) (strict liability claim that product unreasonably dangerous due to failure to provide inadequate labeling preempted by FIFRA); *King v. E.I. Dupont De Nemours & Co.*, 996 F.2d 1346 (1st Cir. 1993) (strict liability claim alleging unreasonably and defectively dangerous product due to a failure to warn preempted by FIFRA); *Trinity Mountain Seed Co. v. MSD Agvet*, 844 F. Supp. 597 (D. Idaho 1994) (strict liability claim preempted by FIFRA because based on pesticide label language); *Kinser v. Ciba-Geigy Corp.*, 837 F. Supp. 217 (W.D.Ky. 1993) (strict liability claim alleging unreasonably dangerous product due to failure to warn preempted by FIFRA.)

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In its amended complaint, Gorton Farms also alleges a breach of warranty claim. It appears, however, that this cause of action was abandoned at trial because the special verdict makes no reference to American Cyanamid's having breached a warranty, whether express or implied. Consequently, we do not consider whether a breach of warranty claim is preempted under FIFRA.

Gorton Farms' third and final cause of action asserts a claim for negligent misrepresentation:

> 17. American Cyanamid Company formulated or manufactured and sold its product know as SCEPTER and negligently held out and represented to Wisconsin Farmers that the product was a safe and effective means of controlling weeds in soybean crops . . . without harm to subsequent crops.
>
> 18. As a result of such negligence, the use of this product by Gorton Farms, Gorton Farms suffered reduction in yield of corn in 1988 and 1989.
>
> . . . .
>
> 19. The foregoing conduct of the defendant's agents or employees were willful and in reckless disregard of the plaintiffs' rights and such conduct proximately cause the plaintiff's actual damages.

The elements of a claim for negligent misrepresentation in Wisconsin are: (1) a duty of care or voluntary assumption of a duty on the part of the defendant; (2) a breach of that duty, i.e., failure to exercise ordinary care in making the representation or

in ascertaining the facts; (3) a causal link between the conduct and the injury; and (4) actual loss or damage as a result of the injury. *Green Spring Farms v. Kersten,* 136 Wis. 2d 304, 319, 401 N.W.2d 816, 822 (1987).

In *Cipollone,* the petitioner alleged two theories of misrepresentation. First, petitioner argued that the respondents, through its advertising, "neutralized the effect of federally mandated warning labels." *Cipollone,* 112 S. Ct. at 2623. The court noted that this claim was predicated on a state-law prohibition against statements downplaying the effects of smoking. *Id.* The Court concluded that because this claim "is merely the converse of a state law requirement that warnings be included in advertising and promotional materials," it is prohibited by sec. 5(b) of the 1969 Act which preempts both requirements and prohibitions. *Id.* Second, petitioner alleged fraud and misrepresentation both by " 'false representation of a material fact [and by] conceal[ment of] a material fact.' " *Id.* (citing trial transcript). The Court noted that the state law duty of such a claim — not making false statements of material fact or concealing such facts — was not the sort of requirement or prohibition proscribed by sec. 5(b). *Id.* The Court explained:

> State law prohibitions on false statements of material fact do not create "diverse, nonuniform, and confusing" standards. Unlike state law obligations concerning the warning necessary to render a product "reasonably safe," state law proscriptions on intentional fraud rely only on a single, uniform standard: falsity. Thus, we conclude that the phrase "based on smoking and health" fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements. Accordingly,

> petitioner's claim based on allegedly fraudulent statements made in respondents' advertisements are not pre-empted by sec. 5(b) of the 1969 Act.

Id. at 2624.

We follow the *Cipollone* reasoning on this point and hold that Gorton Farms' claim based on misrepresentation survives preemption under FIFRA.[9] We see nothing in FIFRA that seeks to overturn the longstanding rules governing misrepresentation. On the contrary, FIFRA simply seeks uniformity in labeling and packaging and mandates that states shall not impose labeling or packaging requirements other than those prescribed by the statute itself. Further, our reading of sec. 136v(b) leads us to conclude that its preemptive effect does not encompass the general duty not to make false statements. Quite simply, claims based on misrepresentations of fact do not challenge the labeling of a manufacturer's product.

Here, Gorton Farms presented evidence that American Cyanamid made representations that SCEPTER was safe to follow corn. These representations were made through written product such as promotional materials, advertisements, technical reports, as well as through oral statements made by American

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9. We note that the *Cipollone* decision in regard to the portion concerning a claim for misrepresentation was part of the plurality joined by Chief Justice Rehnquist and Justices White, Stevens, and O'Connor. *Cipollone*, 112 S. Ct. at 2623–24. However, Justice Blackmun, with whom Justices Kennedy and Souter joined, agreed with that part of the judgment determining that one of the plaintiff's misrepresentation claims was not preempted under FIFRA. *Id.* at 2629–31. Thus, seven justices reached the ultimate conclusion that one of the plaintiff's state law misrepresentation claims was not preempted by federal law.

Cyanamid's technical service representatives. All of the statements assuring that SCEPTER was "safe" and "extremely safe" had no relation to the labeling or packaging of the herbicide. Gorton Farms also presented evidence that American Cyanamid internal documents unequivocally showed that SCEPTER caused damage to follow corn crops in a variety of circumstances and yet, the company failed to disclose any information other than assertions that SCEPTER was safe to follow corn. As noted by Gorton Farms in its brief to this court: "Having heard rumors of SCEPTER carry over to follow corn in the fall of 1987, John Gorton asked an [American Cyanamid] technical service representative about it in February 1988, and [American Cyanamid's] representative assured him it was safe to plant corn following soybeans treated with SCEPTER. Thereafter, Gorton Farms again purchased SCEPTER for use in 1988."

We conclude that not only does the Gorton Farms' misrepresentation claim survive preemption under FIFRA, the evidence adduced at trial was credible and sufficient to sustain the jury's finding that American Cyanamid made negligent misrepresentations of facts as to the safety of SCEPTER and that this conduct was outrageous. As this court previously has noted, the proper test to be applied in determining whether a jury's answer should be sustained is whether there is any credible evidence to support the jury's answer. *Giese v. Montgomery Ward, Inc.*, 111 Wis. 2d 392, 408, 331 N.W.2d 585, 593 (1983); *D'Huyvetter v. A.O. Smith Harvestore Products*, 164 Wis. 2d 306, 320, 475 N.W.2d 587, 592 (Ct. App. 1991). "There is credible evidence which, when reasonably viewed, fairly admits an inference supporting the jury's findings. That being true, neither the trial court nor this court has authority to change the jury's findings." *Giese*, 111 Wis. 2d at 408, 331

N.W.2d at 593. Where, as here, the jury verdict has the approval of the circuit court, the scope of review is even more limited. *See Fehring v. Republic Ins. Co,* 118 Wis. 2d 299, 305, 347 N.W.2d 595, 598 (1984). Our review of the evidence adduced at trial leads us to conclude that there is credible evidence to support the jury's findings. Gorton Farms presented evidence that: American Cyanamid voluntarily assumed a duty; breached that duty by failing to exercise ordinary care in making the representations concerning SCEPTER; that the injury was caused by the conduct of American Cyanamid; and, that Gorton Farms sustained actual loss and damage as a result of the injury to its follow corn crops.[10]

II. Attorney Fees

Following trial, counsel for Gorton Farms filed a petition requesting an award of attorney fees pursuant to sec. 100.18, STATS. — "Fraudulent representations." In short, sec. 100.18 provides that no person or corporation may advertise, announce or make a statement that "contains any assertion, representation or statement of fact which is untrue, deceptive or misleading."

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10. In its brief to both the court of appeals and the supreme court, American Cyanamid presents an argument that even granting that FIFRA does not preempt all of Gorton Farms' claims, "[t]he economic loss doctrine precludes the respondents from recovering damages based upon their tort claims." This issue was not raised before the circuit court either at trial or in a motion after verdict. The court of appeals in its certification memorandum did not consider the issue. We conclude that because American Cyanamid failed to properly raise the issue at the circuit court level, it has waived the right for consideration of the issue by this court. *See Allen v. Allen,* 78 Wis. 2d 263, 270–71, 254 N.W.2d 244, 248 (1977) (supreme court generally does not review an issue raised for the first time on appeal).

Appendix D

As relevant here, Gorton Farms sought attorney fees under sec. 100.18(11)(b)2, STATS., which states: "Any person suffering pecuniary loss because of a violation of this section by any other person may sue in any court of competent jurisdiction and shall recover such pecuniary loss, together with costs, including reasonable attorney fees."

The facts surrounding the issue of attorney fees are not in dispute. Gorton Farms filed their original complaint on February 8, 1990. They subsequently amended their complaint twice prior to trial. These documents did not contain an allegation that American Cyanamid had violated sec. 100.18, STATS. During trial, counsel did not present a specific allegation concerning a violation of sec. 100.18. Further, no jury instruction was requested concerning this statutory cause of action.

Following the jury verdict, on February 3, 1994, Gorton Farms moved for judgment on the verdict pursuant to sec. 805.14(5), STATS. On March 4, 1993, counsel for Gorton Farms filed a document titled "Petition For Hearing Regarding Attorney Fees." The document asserted that "[i]n the course of discovery and during the trial of the case, evidence was obtained by the plaintiffs which showed that the defendant violated Section 100.18 of the Wisconsin Statutes and that plaintiffs were damaged by reason of the defendant's violation of that section." Counsel then requested that Gorton Farms be allowed to amend their pleadings to assert a claim that American Cyanamid violated sec. 100.18. Counsel, citing *John v. John*, 153 Wis. 2d 343, 450 N.W.2d 795 (Ct. App. 1989), *cert. denied*, 498 U.S. 814 (1990), asserted in the alternative that the pleadings would not necessarily have to be amended because a prayer for relief is not a substantive part of the complaint.[11]

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11. In *John*, the court of appeals determined that an amendment (Cont'd)

Appendix D

The parties filed briefs on the matter and hearings before the circuit court were held on June 7, 1993, and July 29, 1993. The court granted the petition and signed an "Order Granting Attorney Fees and for Amendment of Judgment" which states in relevant part: "After hearing the parties, the Court stated its decisions and the reasons for its decisions orally on the record wherein it found that the plaintiffs were damaged by reason of defendant's untrue, deceptive or misleading statements within the meaning of Section 100.18 Wis. Stats."

On appeal, American Cyanamid presents two arguments relating to this issue:

> 1. "The trial court lacked competence to rule on a petition for attorney fees pursuant to sec.100.18(11)(b)2, STATS. filed more than six months after the verdict was rendered," and;
>
> 2. "The trial court erred in failing to apply sec. 802.09(2), STATS. to plaintiffs petition for attorney fees."[12]

Both of these issues are framed in a manner that suggests an attack on the procedural aspects of the case rather than the substantive concern of whether attorney fees are appropriate

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(Cont'd)
of the pleadings in the case was unnecessary because "[t]he only post-trial change consisted of an additional form of relief," and "[a] prayer for relief is not a substantive part of the complaint." *John*, 153 Wis. 2d at 367, 450 N.W.2d at 806.

12. As an initial matter, we note that American Cyanamid did not take issue on appeal with the reasonableness of the attorney fees as awarded by the circuit court. Thus, we pass no judgment as to the reasonableness of the amount awarded.

under the present circumstances. The second issue, however, does entail, to some extent, a consideration of the substantive concerns. We will address each issue in turn.

American Cyanamid first asserts that the trial court lacked competence because Gorton Farms did not follow proper rules of civil procedure pursuant to sec. 805.16, STATS. Section 805.16(1), STATS., provides that "[m]otions after verdict shall be filed and served within 20 days after the verdict is rendered, unless the court, within 20 days after the verdict is rendered, sets a longer time by order specifying the dates for filing motions, briefs or other documents." Further, sec. 805.16(3), STATS., states that "[i]f within 90 days after the verdict is rendered the court does not decide a motion after verdict on the record . . . The motion is considered denied and judgment shall be entered on the verdict."

Here, there is no dispute that more than 20 days elapsed before counsel filed the request for attorney fees. Further, the circuit court ruling awarding attorney fees was entered more than 90 days after the entry of the verdict. These facts, however do not mandate the conclusion that the circuit court was without authority to act in awarding attorney fees.

First, sec. 805.16 contemplates trial-related motions — new trial, evidentiary considerations, etc. A petition for attorney fees, on the other hand, is not trial-related; rather, it is verdict-related as it is predicated on a party's prevailing party status. Second, case law indicates that an award of attorney fees may be considered after entry of a judgment or order. For instance, in *ACLU v. Thompson,* 155 Wis. 2d 442, 446, 455 N.W.2d 268, 270 (Ct. App. 1990), the court concluded that a trial court could postpone an award of attorney fees in a civil rights action

brought under 42 U.S.C. sec. 1983 without depriving its order or judgment on the merits of finality and appealability. The court reached this conclusion by noting that making an award prior to a final judgment being entered is unnecessary because the fee determination is separate from the underlying action. *Id.* at 446, 455 N.W.2d at 270. Further, in *Richland School Dist. v. DILHR,* 166 Wis. 2d 262, 285–86, 479 N.W.2d 579, 589 (Ct. App. 1991), *aff'd* 174 Wis. 2d 878, 498 N.W.2d 826 (1993), the court held that the time limit on the request for statutory attorney fees to the trial court "is a reasonable time after the court enters a final order or judgment on the merits favorable to the requester. Only then will the requester know that the litigation has terminated and that the requester has prevailed." In *Richland School Dist.,* the request for attorney fees came 41 days after the trial court rendered its decision. *Id.* at 287 n.7, 479 N.W.2d at 590 n.7.

American Cyanamid next argues that the circuit court misapplied sec. 802.09(2), STATS., to the facts at hand. Section 802.09(2), STATS., provides:

> AMENDMENTS TO CONFORM TO THE EVIDENCE. If issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended

> and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

American Cyanamid posits that Gorton Farms' request for attorney fees under sec. 100.18, STATS., was never tried by either express or implied consent and, therefore, the pleadings should not have been amended to include this claim. Gorton Farms counters that an amendment under sec. 802.09(2) was unnecessary because a claim for attorney fees was not part of the merits of the action to which fees pertain. Gorton Farms asserts in the alternative that even assuming an amendment of the pleadings was necessary, the circuit court acted within its discretion in amending the pleadings because an amendment was necessary to conform them to the evidence presented at trial.

American Cyanamid's protests notwithstanding, this case clearly deals with allegations that American Cyanamid engaged in false and misleading advertising resulting in pecuniary loss to the plaintiffs. These are exactly the type of allegations that fall within the purview of sec. 100.18(1), STATS. *See Grube v. Daun,* 173 Wis. 2d 30, 57, 496 N.W.2d 106, 116 (Ct. App. 1992) (noting that "Wisconsin Supreme Court and this court have made clear that the statute intends to protect the public from all untrue, deceptive or misleading representations made in sales promotions, including representations made in face-to-face sales where no media advertising is involved."). Gorton Farms' negligent misrepresentation claim, as presented by the

evidence at trial, entailed all of the elements of a claim brought pursuant to sec. 100.18(1), STATS. Thus, the jury, as well as the circuit court judge, heard all of the evidence that it needed to render a decision regarding the sec. 100.18 claim. The jury returned a verdict that American Cyanamid was negligent and that its conduct was outrageous.

We conclude that the circuit court properly exercised its discretion in determining that sec. 802.09(2), STATS., would allow Gorton Farms' post-trial request for attorney fees. American Cyanamid had ample opportunity to rebut the underlying allegations stemming from a sec. 100.18, STATS., claim, and in fact, presented substantial evidence at trial in an effort to rebut Gorton Farms' assertions on this point. As noted by the circuit court: "[T]he plaintiffs did in fact suffer pecuniary losses because of a violation of this section [sec. 100.18] and accordingly should be permitted reasonable attorney fees." Quite simply, it is disingenuous for American Cyanamid to presently assert that it had no idea that its statements relating to the sale of SCEPTER were to be at issue during trial.

In sum, although there is an argument that Gorton Farms should have pleaded a sec. 100.18, STATS., claim prior to or during trial, there is no dispute that the claim was fully aired at trial. Further, in asserting a claim for attorney fees post-trial, American Cyanamid was in no way prejudiced. *See State v. Peterson,* 104 Wis. 2d 616, 312 N.W.2d 784 (1981); *Zobel v. Fenendael,* 127 Wis. 2d 382, 379 N.W.2d 887 (Ct. App. 1985). There simply was no other evidence that could have been presented during trial to rebut a sec. 100.18 claim vis a vis the claims that were already at issue based on the original and amended complaints.

By the Court. — Order of the circuit court is affirmed.

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN FILED FEBRUARY 14, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 93-C-566

CHARLES H. KUIPER, SR., MAE E. KUIPER, and CHARLES A. KUIPER, JR. d/b/a CHARLES H. KUIPER & SON FARMS,

Plaintiffs,

v.

AMERICAN CYANAMID COMPANY,

Defendant.

ORDER

On February 14, 1996, upon the reference of Judge Rudolph T. Randa, the court conducted a hearing on the plaintiffs' motion to compel and for sanctions. Appearing on behalf of the plaintiffs was Attorney Robert Bichler and Attorney JoAnne Breese-Jaeck and on behalf of the defendant was Attorney Kenneth Ness. Based upon the written submissions and oral arguments of the parties, and for the reasons stated on the record,

IT IS HEREBY ORDERED,

Appendix E

1. The plaintiff's motion to compel is **granted** in part and **denied** in part.

a. As to the items furnished by the defendant to plaintiff's counsel prior to the hearing, the motion is **denied** as moot.

b. The defendant shall contact and obtain from its various local counsel any missing exhibits to depositions, the missing ten pages from the deposition transcript and any deposition transcript of Darryl Fry or other defendant's employees not produced. These documents shall be furnished to plaintiffs' counsel by **February 19, 1996** or, if not, a statement shall be furnished as to the specific efforts made to locate these documents.

c. The defendant is to continue to search for deposition transcripts of any experts of the defendant in SCEPTER litigation across the country. Defense counsel is to advise plaintiffs' counsel no later than **February 16, 1996** as to the status of this search. If no transcripts were located, the defendant is to demonstrate efforts made, i.e. attorneys contacted and responses received. If transcripts are located, the defendant is to furnish copies of such transcripts to plaintiffs' counsel immediately but no later than **February 19, 1996**.

d. The plaintiff's deposition of Dr. Campbell shall be conducted by telephone prior to **February 29, 1996**.

2. The plaintiff's motion for sanctions is **granted** in part and **denied** in part. The plaintiff is entitled to reasonable costs

and fees for bringing the motion to compel and in not being provided with materials in a timely fashion in the amount of $750.00.

Dated at Milwaukee, Wisconsin, this 14th day of February, 1996.

s/ Aaron E. Goodstein
AARON E. GOODSTEIN
U.S. MAGISTRATE JUDGE

APPENDIX F — EXCERPTED PAGES FROM PETITION FOR WRIT OF CERTIORARI

No. 95-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

AMERICAN CYANAMID COMPANY,

Petitioner,

v.

JOHN L. GORTON, THOMAS HAUCH, TIMOTHY HAUCH and MICHAEL VANDER LEEST, PARTNERS UNDER THE NAME GORTON FARMS,

Respondents.

Petition for a Writ of Certiorari to the
Supreme Court of Wisconsin

PETITION FOR A WRIT OF CERTIORARI

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Appendix F

QUESTIONS PRESENTED

Whether the Seventh Amendment's guarantee of a jury trial in civil cases should be incorporated under the Fourteenth Amendment's Due Process Clause.

Whether a state, after granting a general right to a jury trial in civil cases, can deprive a defendant of that right without violating the Fourteenth Amendment's Due Process Clause.

Whether a state trial court judge can find that a defendant violated a state consumer protection statute, and based on such finding award attorney fees under that statute, without violating the Fourteenth Amendment's Due Process Clause, where a violation of the statute was not alleged prior to or during trial, where a jury trial already has been held, and where the jury has made no findings establishing a violation of the statute.

APPENDIX G — RELEVANT STATUTES

28 USCS §1738

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

7 USCS § 136

(bb) **Unreasonable adverse effects on the environment.** The term "unreasonable adverse effects on the environment" means any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide.

Appendix G

7 USCS §136a

(a) Requirement of registration. Except as provided by this Act [7 USCS §§ 136 et seq.], no person in any State may distribute or sell to any person any pesticide that is not registered under this Act [7 USCS §§ 136 et seq.]. To the extent necessary to prevent unreasonable adverse effects on the environment, the Administrator may by regulation limit the distribution, sale, or use in any State of any pesticide that is not registered under this Act [7 USCS §§ 136 et seq.] and that is not the subject of an experimental use permit under section 5 or an emergency exemption under section 18 [7 USCS § 136 p].

* * *

(c) Procedure for registration. (1) Statement required. Each applicant for registration of a pesticide shall file with the Administrator a statement which includes —

* * *

(C) a complete copy of the labeling of the pesticide, a statement of all claims to be made for it, and any directions for its use;

* * *

(5) Approval of registration. The Administrator shall register a pesticide if the Administrator determines that, when considered with any restrictions imposed under subsection (d) —

(A) its composition is such as to warrant the proposed claims for it;

(B) its labeling and other material required to be submitted comply with the requirements of this Act [7 USCS §§ 136 et seq.];

(C) it will perform its intended function without unreasonable adverse effects on the environment; and

(D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

* * *

(f) Miscellaneous.

(1) Effect of change of labeling or formulation. If the labeling or formulation for a pesticide is changed, the registration shall be amended to reflect such change if the Administrator determines that the

change will not violate any provision of this Act [7 USCS §§136 et seq.].

(2) Registration not a defense. In no event shall registration of an article be construed as a defense for the commission of any offense under this Act [7 USCS §§ 136 et seq.]. As long as no cancellation proceedings are in effect registration of a pesticide shall be prima facie evidence that the pesticide, its labeling and packaging comply with the registration provisions of the Act [7 USCS §§136 et seq.].

(3) Authority to consult other federal agencies. In connection with consideration of any registration or application for registration under this section, the Administrator may consult with any other Federal agency.

* * *

7 USCS §136v

(a) **In general.** A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this Act [7 USCS §§136 et seq.].

(b) **Uniformity.** Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act [7 USCS §§ 136 et seq.].

* * *

§100.18, Wis. Stats.

(1) No person, firm, corporation or association, or agent or employe thereof, with intent to sell, distribute, increase the consumption of or in any wise dispose of any real estate, merchandise, securities, employment, service, or anything offered by such person, firm, corporation or association, or agent or employe thereof, directly or indirectly, to the public for sale, hire, use or other distribution, or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate, merchandise, securities, employment or service, shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, magazine or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, label, or over any radio or television station, or in any other way similar or dissimilar to the foregoing, an

advertisement, announcement, statement or representation of any kind to the public relating to such purchase, sale, hire, use or lease of such real estate, merchandise, securities, service or employment or to the terms or conditions thereof, which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

(11)(b)2. Any person suffering pecuniary loss because of a violation of this section by any other person may sue in any court of competent jurisdiction and shall recover such pecuniary loss, together with costs, including reasonable attorney fees. Any person suffering pecuniary loss because of a violation by any other person of any injunction issued under this section may sue for damages therefor in any court of competent jurisdiction and shall recover twice the amount of such pecuniary loss, together with costs, including reasonable attorney fees.

3. No action may be commenced under this section more than 3 years after the occurrence of the unlawful act or practice which is the subject of the action. No injunction may be issued under this section which would conflict with general or special orders of the department or any statute, rule or regulation of the United States or of this state.